TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

~~No. 318.~~ 43

JOHN STRYKER, PLAINTIFF IN ERROR,

vs

GEORGE CRANE, ADMINISTRATOR OF EDWARD K. GOODNOW, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED SEPTEMBER 26, 1884.

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a On the 17th day of November, 1883, Edward K. Goodnow (pl'ff & appellant in sup. court of Iowa), filed in the office of the clerk of the supreme court of Iowa his printed abstract of the record, the same, with the written endorsements thereon, being in the words and figures following, to wit:

Appellant's Abstract.

1 Supreme Court of Iowa. December Term, A. D. 1883. Des Moines.

EDWARD K. GOODNOW
vs.
JOHN STRYKER. } 10767.

Appeal from the judgment of Webster district court.

George Crane, for appellant; G. H. Gatch, for appellee.

On the 5th of August, 1876, plaintiff filed his petition in said circuit court of Webster county, stating his cause of action as follows:

Par. 1st. The said Edward K. Goodnow, plaintiff herein, respectfully represents unto said court that the Iowa Homestead Company is a corporation duly organized and existing under and by virtue of the laws of the State of Iowa; that on or about the year A. D. 1863, the said homestead company received from the Dubuque & Sioux City Railroad Company, a corporation also existing under
2 and by virtue of the laws of Iowa, a deed, duly signed, executed, and delivered by said railroad company, purporting to convey in fee simple absolute to the said homestead company the following-described real estate—that is to say:

The south half of the northeast quarter of section 29, township 89, range 28; the northeast quarter of section 5, township 88, range 28; the northwest quarter of section 19, township 88, range 27; the east half and southwest quarter and northwest quarter of southwest quarter and the southeast quarter of section 7, township 90, range 28, all in said Webster county, Iowa.

Par. 2d. Plaintiff further avers that from and after the execution and delivery of said deed as aforesaid till the year A. D. 1873, the said homestead company honestly and in good faith believed that it was the absolute owner of and held a good and valid title to the land aforesaid; but in the year A. D. 1873 the Supreme Court of the United States, in a suit therein pending for the purpose of testing the right and title of said homestead company to said lands, decided finally that said company was not the owner thereof and never had any right or title thereto since which time said company has not claimed to be the owner of said land.

Par. 3d. Plaintiff further avers that during the continuation of such belief and claim of ownership the said homestead company gave or delivered over to Webster county, a municipal corporation organized and existing under the laws of the State of Iowa, and within whose territorial limits said lands are situated, the taxes duly

assessed and levied by said county upon said lands—that is to say, the following amounts for the following years, respectively:

For the year 1864	$64 33
For the year 1865	109 15
For the year 1866	132 30
For the year 1867	78 25
For the year 1868	93 30
3 For the year 1869	122 26
For the year 1870	141 77
For the year 1871	164 95

And took from said county receipts showing the amounts so handed over to said county.

Par. 4th. Plaintiff further avers that the taxes so assessed and levied by said county on or against said lands became and were a valid and binding lien thereon in favor of said county, which said lien was paramount to all other liens or incumbrances thereon; that long prior to the assessment and levy of said taxes upon said lands the said John Steiger, defendant herein, became and was the owner thereof, and ever since has been such owner, but of the defendant's said ownership said homestead company had no knowledge or notice at the time of receiving its deed therefor, nor till about the year 1873, and long after the payment of said taxes.

Par. 5th. Plaintiff further avers that said defendant has never paid to said county the taxes aforesaid or any part or parcel thereof.

Par. 6th. Plaintiff further avers that said county has always hitherto refused and still refuses to refund to said homestead company or its assigns the taxes so given or delivered over to said county by said homestead company, as hereinbefore alleged, and said county has always hitherto refused and still refuses to take any steps whatever to collect the aforesaid taxes from the said defendant or any part thereof, or to enforce the lien given by the law upon said land to secure the due payment thereof.

Par. 7th. Plaintiff further avers that said county has the legal right and power and is in duty bound to collect the taxes aforesaid from the defendant, who was the legal owner of said lands at the time said taxes were levied against the same, and was justly bound to pay the said taxes to said county.

Par. 8th. Plaintiff further avers that the said Iowa Home-
4 stead Company has assigned, transferred, and set over to the said plaintiff all right, title, claim, demand, or cause of action, either in law or equity, which said company may have had against said Webster county or against the said defendant or any other person on account of or by reason of the payment to said county of the aforesaid taxes; a copy of which assignment is hereto annexed, marked Exhibit B, and made part of this petition.

Par. 9th. Wherefore the plaintiff prays that an account be taken of the amount of taxes that said defendant should pay, and that a decree for the amount so found to be due be entered up against said defendant in the name of the plaintiff, or in the name of said Webster county, for the use and benefit of plaintiff, and made a lien on

the lands hereinbefore described; that said lands be ordered to be sold to pay off said decree; and that plaintiff have such other and further relief in the premises as equity and good conscience may require, and to this court may seem meet.

GEORGE CRANE,
Attorney for Plaintiff.

On January 19th, 1877, the defendant filed a demurrer to plaintiff's petition.

On the 12th of February, 1879, the county of Webster filed the following petition:

And now comes said Webster county, a party in the above-entitled cause, and, as a substitute for the pleadings heretofore filed therein, pleads as follows—

That is to say, the said county now comes and claims the benefit of the commencement of this suit by the said plaintiff, and asks a decree or judgment against the said John Stryker, defendant, as prayed for in the plaintiff's said petition.

Said county further says that the taxes mentioned in said petition were duly and legally assessed and levied by said county upon the lands therein mentioned at the times, for the years and amounts, and in the manner and form alleged and set forth in said petition, and that the said taxes at the times of the said several assessments became and were and still are a valid and binding lien upon said lands in favor of said county.

That at the times aforesaid and at the commencement of this suit the said John Stryker was the owner in fee of the said lands, and still is in duty bound to pay said taxes to said county.

Said county further says that at and before the assessment aforesaid the said John Stryker was and has been continuously ever since a non-resident of the State of Iowa.

Said county further says that said taxes have never been paid nor any part thereof, and that said defendant, John Stryker, has never paid said taxes to said county or any part thereof; on the contrary, the whole thereof is still due to said county from the said defendant.

Wherefore said county asks for a decree against said defendant, John Stryker, for the sum of $1,200 and interest thereon, being the amount of taxes due said county as above set forth, and that the same be made a special lien upon the lands described in said petition, and that said county have such other and further judgment, order, or decree and relief as the court may deem meet and agreeable to equity and good conscience.

J. F. DUNCOMBE,
Attorney for Webster County.

And afterwards, on the 5th of April, 1879, plaintiff filed the following amendment to his petition:

And now comes the plaintiff, E. K. Goodnow, and, by way of amendment and addition to the petition heretofore filed, says that

the taxes mentioned in plaintiff's original petition were duly levied and assessed by the said Webster county against the lands of defendant at the times and in the manner and forms therein alleged;
6 that at the time plaintiff's assignor gave or delivered to said county the taxes aforesaid it was agreed and understood that if the said county should receive or collect the said taxes of and from the said defendant that the said county would repay the taxes so collected to plaintiff's assignor.

Plaintiff further says that before the levy and assessment of said taxes the said defendant was and has been continuously ever since then a non-resident of the State of Iowa.

Plaintiff further says that it was also agreed and understood that said county would sue defendant in his own name for the taxes mentioned in said petition, and in case it should collect the same would pay them to plaintiff's assignor.

Plaintiff further says that if said defendant refuses to pay said taxes to said county, and claims that said taxes have been paid to said county through or by means of the plaintiff's assignor having given or delivered the same to the county, then said defendant is bound to repay the same to plaintiff.

Wherefore plaintiff asks the relief in the premises heretofore prayed for, that a decree be entered in the name of said county against defendant for said fifteen thousand dollars and interest, and be made a special lien on the lands described in petition, and for such other and further relief as equity and good conscience may require.

GEORGE CRANE,
Attorney for Plaintiff.

April 5, 1879, defendant filed his answers to the petitions in the words following:

Par. 1. And now comes the defendant, John Stryker, and, for answer to the original petition of plaintiff, Edward K. Goodnow, and the amendment thereto, denies each and every allegation therein contained.

2. Said defendant, further answering, says that if said plaintiff ever had any right or cause of action against defendant for the recovery of said taxes or any sum of money on account or by
7 reason of the plaintiff's having delivered or paid said taxes to said county such cause of action arose or accrued to plaintiff more than five years before the commencement of this suit, and is therefore barred by the lapse of time.

Par. 3. Said defendant, further answering, says that the said homestead company paid said taxes to said county voluntarily and without the request, knowledge, or consent of the defendant, and with full knowledge of all the facts and circumstances upon which defendant's claim of title to said lands was founded. Wherefore defendant asks to be dismissed with his reasonable costs and charges.

THEO. HAWLEY,
Defendant's Attorney.

Par. 1. And now comes the defendant, John Stryker, and, for answer to the pleading or petition filed by said county of Webster in this suit, says that said county is not a party plaintiff on the record, and not entitled to ask for any relief in the character of plaintiff in this suit, and has no legal right to take advantage of or claim any benefit from the commencement of this suit by the said Edward K. Goodnow.

Par. 2. Said defendant, further answering, denies each and every allegation in said pleading or petition contained.

Par. 3. Said defendant, further answering, says that all of said taxes mentioned in said petition were duly paid by said Iowa Homestead Company as soon as the same became due, and said defendant is no longer liable therefor.

Par. 4. Said defendant, further answering, says that if said county ever had any right or cause of action against defendant for the recovery of said taxes or any part thereof said cause of action arose or accrued to said plaintiff more than five years before the commencement of this suit, and it is therefore barred by the lapse of time.

Par. 5. Said defendant, further answering, says that said
8 Iowa Homestead Company paid said taxes to said company voluntarily and without the request, knowledge, or consent of the defendant, and with full knowledge of the facts and circumstances upon which defendant's title to said lands was founded Wherefore defendant asks to be dismissed with his proper costs.

THEO. HAWLEY,
Defendant's Attorney.

Afterwards to all the foregoing answers plaintiff filed replies denying all the allegations therein contained.

After said cause had been to the supreme court of this State, and reversed on June 3d, 1881, the defendant filed herein an amendment to his former answer, to the filing of which the plaintiff consented and agreed to make no objection thereto during the further progress of the case.

Said amendment is in the words following:

"Comes now the defendant, and, by leave of court first had and obtained, amends his answer herein, and alleges that in an action in which the said Iowa Homestead Company, the assignor of plaintiff, was plaintiff, and the Des Moines Navigation and Railroad Company, The defendant, John Stryker and others, were defendants, commenced in the district court of Webster county, Iowa, and finally determined in and by the Supreme Court of the United States, the said homestead company, prior to the date of the alleged assignment of said alleged cause of action in the petition herein, asserted and mentioned among other things the right to recover of the defendant therein the same taxes the recovery of which is sought for in this action; that one of the issues made by the pleadings in said cause and determined by the proofs in said action was the right of the said homestead company to recover the same identical taxes sought to be recovered in this action, and that it was in

said action determined, adjudged, and found by said Supreme Court of the United States, at the December term thereof for 1872, that the said homestead company was not entitled to recover said
9 taxes or any part thereof, which said determination and judgment has never been in any manner set aside, vacated, or modified, but that the same remains and still is in full force and effect.

Further answering, defendant avers that the several causes of action set up in plaintiff's petition accrued more than six years next before the commencement of this suit, and at all times since the date of the payment of said taxes this defendant was a citizen of the State of New York, and that by the laws of the State of New York all causes of action based upon an expressed or implied promise not in writing are barred after the expiration of six years from the date when said causes of action severally accrued; that the said several causes of action set up in plaintiff's petition are barred by the lapse of six years from the date when the same accrued under the laws of the State of New York, and that more than six years have elapsed from the time said causes of action severally accrued and the date of the commencement of this suit.

THEO. HAWLEY,
Defendant's Attorney.

And afterwards plaintiff filed his reply in the words following:

And now cometh plaintiff, Edward K. Goodnow, and for reply to the answer of the defendant, John Stryker, says that the judgment set up therein as an adjudication of the rights of the plaintiff is and was null and void, for the reason that the courts of the United States had no jurisdiction of said suit and no legal power or authority to render a decree or judgment therein.

Plaintiff denies each and every allegation in said answer contained, and asks for a judgment as heretofore prayed.

GEORGE CRANE,
Attorney for Plaintiff.

10 Afterwards, on the 2d day of October, A. D. 1883, this cause coming on for final hearing on *procedendo* from the supreme court of Iowa, the same was submitted to the court on the pleadings and the following agreed statements of facts and evidence, to wit:

Agreed Facts.

In the Circuit Court of Webster County, Iowa.

EDWARD K. GOODNOW *vs.* JOHN STRYKER and WEBSTER CO.

In the circuit court of said county.

For the benefit of all parties to this suit, it is hereby stipulated and agreed as follows:

It is admitted that the facts set forth in the first, second, and eighth paragraphs of plaintiff's original petition are true.

It is further admitted that prior to the year 1864 and till the year

1873 defendant, John Stryker, was the owner in fee-simple of all the lands mentioned in the petition.

It is further admitted that the said county of Webster duly and legally levied and assessed upon the lands aforesaid for the years named the several amounts of taxes set forth in Exhibit A, hereto annexed and made part of this agreement.

It is further admitted that said several assessments of said lands were made by said county to unknown owners.

It is further admitted that the said Iowa Homestead Company gave or delivered over to said county the several amounts of taxes mentioned in said Exhibit A at the several dates therein set forth, and took from said county receipts for the sums of money so handed over; that at the time said money was given to said county said homestead company did not know or believe that said defendant was the owner of said lands; that said several taxes were so
11 handed over without any actual demand therefor by said county; that said defendant has never paid said taxes to said county or any part thereof, unless the payments made by said homestead company constituted a payment for the benefit of the defendant.

It is admitted that said county has always heretofore refused to refund to the Iowa Homestead Company, or to said Goodnow, the taxes delivered over to said county as aforesaid.

It is further admitted that in the year 1873 said defendant, John Stryker, was and has been continuously ever since then a non-resident of the State of Iowa.

It is further admitted that all of said taxes were handed over by said homestead company to said county without any previous request from the said defendants, and by mistake as to the true ownership of said lands, but in good faith and under belief of ownership as alleged in the first, second, and third paragraphs in the petition, and that defendant knew that said taxes were being paid by said company at the time.

These facts are admitted for the purpose of the trial of this suit and nothing else.

Signed this 5th day of April, 1879.

GEORGE CRANE,
Attorney for Plaintiff.
THEO. HAWLEY,
Defendant's Attorney.

EXHIBIT A, referred to and made a part of agreed statement of facts.

For 1864, paid January 16, 1865	$50 90
For 1865, paid November 25, 1865	59 29
For 1866, paid February 28, 1867	76 43
For 1867, paid July 1, 1868	61 20
For 1868, paid April 15, 1869	71 46
For 1869, paid February 28, 1870	77 44
12 For 1870, paid February 28, 1871	66 82
For 1871, paid February 28, 1872	105 17

Defendant then read in evidence the following agreed statement:

For the purpose of the trial of the above-entitled cause it is hereby stipulated and agreed—

1. That the defendant, John Stryker, is now and has been since the year 1860 a citizen and resident of the State of New York.

2. That the statute and laws of the State of New York now in force, and which have been in force since 1860, provide that all causes of action based on or arising out of an express or implied promise not in writing are barred after the expiration of six years from the date when said causes of action severally accrued.

3. That on the hearing and trial of these causes the defendant may offer and read in evidence from the journal of the proceedings of the board of supervisors of Webster county and the tax-lists of said county such portions thereof as he may deem relevant and material, subject to all objections by plaintiff as to their relevancy, materiality, or competency.

4. That the defendant, through his agent, Benj. Grayson, during the years mentioned in the petitions herein, applied yearly to the treasurer of Webster county, Iowa, to pay the taxes levied and assessed upon the land in said petition described, and found those mentioned and described in plaintiff's Exhibit A marked paid upon the tax-lists for those years, respectively.

It is understood that by signing this agreement plaintiff does not waive his right to object to the introduction of the foregoing facts or any part thereof on the ground of irrelevancy, incom-
13–26 petency, or that it is too late, the cause having been tried in the supreme court of Iowa.

GEORGE CRANE,
Attorney for Plaintiff.
THEO. HAWLEY,
Defendant's Attorney.

27 The plaintiff then read in evidence from the printed transcript of the record in the Supreme Court of the United States, in the case of The Iowa Homestead Company against The Des Moines Valley Railroad Company, referred to in said agreed statement of facts, the following portions thereof:

In the District Court of Webster County, Iowa.

IOWA HOMESTEAD COMPANY

vs.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY., EDWIN C. Litchfield, Electus B. Litchfield, Samuel G. Wolcott, & Others, and Roswell B. Burrows.

To said defendants above named:

You are hereby notified that there is now on file in the office of the clerk of the district court of Webster county, Iowa, the petition of plaintiff aforesaid, claiming of you that the said Iowa Homestead Company is in possession and has the legal title to certain lands in

the alternate sections within five miles of Des Moines river, above the Raccoon Forks; that you claim in some way an adverse title thereto; that you be enjoined from prosecuting actions at law or pre-emptions to said lands to quiet the plaintiff's title, and for other relief. You are also notified that unless you appear thereto and defend before noon of the second day of the term of the said district court of Webster county, to be held on the twelfth day of October, 1868, a default will be entered against you and judgment rendered thereon.

IOWA HOMESTEAD COMPANY,
GRANT & SMITH, *Attorneys.*

DES MOINES, IOWA, 10*th October*, 1868.

Accepted service for the defendants, The Des Moines Navi-
28 gation and Railroad Company and Edwin C. Litchfield and Electus B. Litchfield.

J. BROWN,
Agent for Defendants.

At chambers, city of Davenport, Scott county, Iowa.

Ordered, That a temporary writ of injunction do issue, as prayed, on plaintiff's filing bond in penal sum of $500, conditioned as required by law, and the sureties to be approved by the clerk of Webster county, Iowa, district court.

Dated first day of October term, A. D. 1868.

JOHN F. DILLON,
Chief Justice Supreme Court Iowa.

THE STATE OF IOWA
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. Wolcott, Wm. B. Wells, Roswell B. Burrows, Edwin C. Litchfield, Wm. McAlpine, Richard B. Chapman, Albert Tracy, Harriet Tracy, Electus B. Litchfield, Edwin Wade, John Stryker, The Des Moines Valley Railroad Company, *et al.*

Whereas the Iowa Homestead Company has filed in our district court for the county of Webster a petition claiming that the said Homestead Company, a corporation created by the laws of Iowa, has the legal title to the lands (which are mentioned and described in plaintiff's petition), and that you or some of you have brought and intend to bring certain actions at law against persons in possession of said lands to divert the title of said Iowa Homestead Company, and that you or some of you are about to prove and claim pre-emptions on some of the lands which are named (in said petition), and has prayed in said bill to grant them title to said lands:

Now, these are to command you and each of you, your agents, attorneys, servants, that you do wholly refrain from prosecuting said actions at law or either of them, and that you wholly
29 refrain from further applying for or proving up pre-emptions on any of said lands until the further order of our said

district court for the county of Webster; and you will disobey this writ at your peril.

Witness, and in testimony, I, W. Lumpkin, clerk of the district court, have hereunto subscribed my name and affixed the seal of said court, at office, in Fort Dodge, this sixth day of October, A. D. 1868.

W. LUMPKIN,
Clerk District Court.

Accepted service of the within writ for the defendants, The Des Moines Navigation and Homestead Company, Edwin C. Litchfield, and Electus B. Litchfield.

J. BROWN,
Agent of said Defendants.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD CO. *et al.*

In this cause come the defendants, Litchfield and John Stryker' and file their affidavit, bond, and petition for the transfer of this cause to the circuit court of the United States for the district of Iowa, under certain acts of Congress of the United States, and the court being satisfied that the said affidavit and petition are sufficient under the law, and said bond being approved by the court, it is ordered that this cause be transferred to said circuit court of the United States for the district of Iowa, as to said defendants *in re*, and the clerk of this court is ordered to make the proper papers for said transfer.

30 STATE OF IOWA, } *ss:*
Webster County, }

THE IOWA HOMESTEAD COMPANY
vs.
EDWIN C. LITCHFIELD, ELECTUS B. LITCHFIELD, and JOHN STRYKER, Impleaded with Roswell B. Burrows, The Des Moines Navigation and Railroad Company, and Others.

I, John Brown, of Des Moines, in the county of Polk, in said State, being duly sworn, do depose and say that I am the agent of the defendants, Litchfield and Stryker, in the above-entitled action; that the same is now pending in the district court of Webster county, Iowa; that the said defendants, for whom I am agent as aforesaid, are citizens of the State of New York, and that the plaintiff is a citizen of the State of Iowa; that the matter in controversy and dispute between this plaintiff and each and every of the defendants exceeds the sum of five hundred dollars, exclusive of costs; that I have reason to believe and do believe that, from prejudice and local influence, said defendants will not be able to obtain justice in the State courts of Iowa, in which this action is pending and untried.

JOHN BROWN.

Subscribed and sworn to by John Brown before me this 13th day of May, A. D. 1869.

GEORGE B. CORKHILL, *Clerk.*

Know all men by these presents that we, Edwin C. Litchfield and Electus B. Litchfield and John Stryker, as principals, and John Brown, as surety, are hereby held and firmly bound unto the Iowa Homestead Company in the penal sum of one hundred dollars, lawful money of the United States; to the payment of which, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

31 The condition of this is such that if the said Edwin C. Litchfield, Electus B. Litchfield, and John Stryker shall enter or cause to be entered in the circuit court of the United States, to be held in and for the district of Iowa, copies of all process pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the district court of the county of Webster and State of Iowa, in which The Iowa Homestead Company is plaintiff and said Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, impleaded, etc., are defendants, and shall do such other appropriate acts as by the act of Congress approved July 27, 1866, entitled An act for the removal of causes in certain cases from State courts, are required to be done upon the removal of a suit in the United States courts, then this obligation to be void; otherwise, in full force.

EDWARD C. LITCHFIELD.
ELECTUS B. LITCHFIELD.
JOHN STRYKER.
JOHN BROWN.

Petition for Removal.

To the district court of Webster county, Iowa:

The petition of Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, defendants in the above-entitled action, respectfully shows that they are citizens of the State of New York; that this action is now pending in the district court of Webster county, Iowa; that the matter in dispute herein exceeds the sum of five hundred dollars, exclusive of costs.

And your petitioners further show that they have in this court their affidavit as required by the act of Congress approved March 2, 1867, entitled "An act to amend an act entitled An act for the removal of causes in certain cases from the State court, approved July 27, 1866."

32 And your petitioners file this petition praying for the removal of this suit into the next circuit court of the United States to be held in and for the district of Iowa, and they herewith offer the surety required by the said above-entitled act.

D. O. FINCH AND J. M. ELLWOOD,
Att'ys for Def'ts Litchfield and Stryker.

This affidavit, bond, and petition are filed in place of the original filed in district court of Webster county 13th October, 1868, the same appearing to be lost and not returned.

GRANT,
For Plaintiff.
J. M. ELLWOOD,
For Litchfield and Stryker.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION & R. R. CO. *et al.*

OCT. 16, 1868.

And now, on this day, come the defendants, Crouse, McDermott, and Cotter, by their attorney, G. Parsons, and file a motion to dissolve the injunction, which, coming on to be heard, and the court being fully advised in the premises, said motion is sustained as to them. Whereupon this cause is ordered transferred to the circuit court of the United States as to other defendants.

Webster District Court.

OCT. 13, 1868.

In this cause the defendants Litchfield and Stryker come and file their affidavits, bond, and petition for the transfer of this cause to the circuit court of the United States for the district of Iowa under certain acts of Congress of the United States, and, the court being satisfied that said affidavits and petition are sufficient under said law, and said bond being approved by the court, it is ordered that this cause, as to the said defendants, be transferred to said circuit court of the United States for the district of Iowa, and the clerk is ordered to make the proper papers for said transfer.

Mr. Clerk, please make the above entry in this cause, and
33 the further entry that as to other defendants the cause is continued by agreement.

GRANT,
For Plaintiff.

The foregoing original notice, acceptance of service, order of Dillon, justice, writ of injunction, and acceptance of service thereof were read in evidence by plaintiff; also the affidavit of James Grant as to the truth of the matters contained in the petition or bill of complaint in said homestead suit, which was in the words following:

STATE OF IOWA, *Scott County:*

I, James Grant, being duly sworn, depose on oath that I am one of the attorneys for the plaintiff; that the facts stated in the foregoing petition are all of them of record, except the allegations of the interest and intent of the parties in the suit of Wolcott *vs.* The Des Moines Navigation Company. I have examined the records referred to in the bill, and have been informed as to the facts about the Wol-

cott suit by parties who appeared to know them, and I believe the allegation of the bill to be true.

JAMES GRANT.

Sworn to and subscribed before me this 1st day of October, 1868.

JOHN F. DILLON,
Judge Supreme Court Iowa.

STATE OF IOWA, *Webster County:*

District Court.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION & R. R. Co. *et al.*

"The petition of the Iowa Homestead Company shows—

"That said company is a corporation duly created by the laws
34 and a citizen of the State of Iowa for the purpose of buying and selling lands in said State; that said plaintiff, by deed of purchase bearing date the 12th of November, 1863, acquired by and through the Dubuque & Sioux City Railroad Company, all the right of said company, the Dubuque and Pacific Railroad Company, and the State of Iowa to about fifty thousand acres of land lying on the east side of the Des Moines river in Webster and Humboldt counties, Iowa, being the odd sections of land within the limits of the Dubuque & Pacific railroad grant of 1856 and the Des Moines river grant of 1856."

It is admitted that the above-described fifty thousand acres of land include and embrace all the lands mentioned and described in the petition of the said E. K. Goodnow in the suit now before this court.

"And by said deed and certificates the plaintiff acquired a title to almost twenty thousand acres of land, in odd sections, within said grants in Webster and Hamilton counties, west of said Des Moines river, a list of which is hereto annexed and made part of this bill. Of these lands the fifty thousand acres lying east of the Des Moines river and claimed by the Des Moines Navigation & Railroad Company, a corporation created by the laws of Iowa, and its assigns, and some title or claim to twenty thousand acres of land on the west side of the river is, or has been, made by the Des Moines Valley Railroad Company, a corporation created by and a citizen of the State of Iowa. * * *

"On the 9th of June, 1854, the State made a contract with the Des Moines Navigation & Railroad Company, a corporation created by the laws of Iowa, to improve the navigation of the river, and to convey to said corporation all the remaining lands belonging to the State under the act of 1846. * * *

"After the settlement of the State with the Des Moines Navigation Company in 1858 the said navigation company conveyed certain
35 parcels of the land now claimed by plaintiff to the following persons, among others: Samuel G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, W. J. McAl-

pine, Richard B. Chapman, Albert Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, and John Stryker. * * *

"The said plaintiffs have been in possession of the lands claimed by them, themselves or their vendees, in contract since 1861. They have paid taxes thereon to the State of Iowa since, in all amounting to eighty thousand dollars, and if their title has failed they are entitled to have their taxes refunded since 1861 by the holder of the legal title, who has not paid them. * * *

"The plaintiff says he has no adequate remedy for the grievances complained of except in a court of equity. He makes The Des Moines Navigation & Railroad Company, Samuel G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John Stryker, The Des Moines Valley Railroad Company, Thomas Cotter, Jacob Crouse, John B. McDermott parties defendant to this suit, and prays for a writ of subpœna against them.

"The plaintiff prays that said parties may be enjoined from prosecuting said actions or any other actions at law in relation to the title or possession of any of said lands until the final hearing of the bill; that the injunction be made perpetual; that said defendants Cotter, Crouse, and McDermott be enjoined perpetually from prosecuting any pre emption to any of said lands; that the conflicting acts of the Secretary of the Interior and judicial decisions may be finally interpreted; that the plaintiffs may be quieted in their title and possession to said lands on both sides of the river, or if the plaintiff's title to said lands is not the better title, and his title to the said lands is the title conveyed by the State, and failed under the right interpretation of the acts of 1846, 1856, and 1862, that his title to an equal number of acres in lieu thereof be decreed
36 and established; that an account be taken of said indemnity lands, and the Des Moines Valley Railroad Company be decreed to make partition thereof and set apart and convey and relinquish to the plaintiff such lands as the plaintiff may be entitled to under said act of July 12th, 1862."

The State of Iowa, being acting trustee, to do justice in the premises and to convey to such party as may be established the true beneficiaries under said act, that in the event of a decree that the plaintiff present title or any part of it has failed, that the said Des Moines Navigation & Railroad Company and its assigns may be decreed to repay to the plaintiff all the taxes which he has paid on said lands and interest thereon; and that said Des Moines Valley Railroad Company be decreed to release to the plaintiff all claims to the indemnity lands set apart to the plaintiff, and for such other relief as the nature of the plaintiff's case may require.

GRANT & SMITH,
Attorneys for Plaintiff.

Comes the plaintiff, October 23d, 1860, and, by leave of court and consent of counsel, files the following amendment to this bill, to wit:

Circuit Court of the United States, District of Iowa.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION & RAILROAD COMPANY *et al.*

The plaintiff, by leave of court and agreement of counsel, amends his description of the property in dispute by adding, after the first clause of the bill, the following words:

That said lands in dispute and claimed by the Des Moines Navigation and Railroad Company and its assignees are the odd sec-
37 tions in townships 86, 87, and 88, ranges 27, 28, 29, and 30 west, which lie south of the second correction line, within five miles of Des Moines river, and townships 89, 90, 91, and 92, ranges 28 and 29, east of the Des Moines river, within five miles of the east branch thereof.

The lands to which the Des Moines Valley Railroad Company makes some claim are the odd-numbered sections in townships 89 and 90, ranges 28 and 29, which lie west of the Des Moines river and within five miles thereof.

GRANT & SMITH.

The amendment, being made to correct and simplify a description of the lands in controversy, is conceded to be true without formal answer.

Part of the Answer of Wm. B. Wells, Defendant in said Suit.

United States Court, District of Iowa.

THE IOWA HOMESTEAD COMPANY, Complainant,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus Litchfield, Edward Wade, John Stryker, and Others, Defendants.

The several answer of the defendant, Wm. B. Wells, to the bill of complaint of The Iowa Homestead Company, complainant.

* * * And this defendant, further answering, denies that the title of the complainant to the lands claimed by these defendants and by the Des Moines Navigation and Railroad Company and its grantees is superior and paramount to that of the said com-
38 pany and its grantees, and he expressly denies that the plaintiff, by reason of the matters in said complainant's bill of complaint contained as against the said Des Moines Navigation and Railroad Company and its grantees, has any title whatever to the said lands claimed by said company and its several grantees, respectively.

And this defendant, further answering, says that, as to whether or not the said complainant and its vendees have been in possession of and paid said taxes on the lands claimed by them since 1861, to

the amount of $80,000, this defendant is ignorant and uninformed save by the said complainant's bill of complaint, but he expressly avers that the possession of the lands by the complainant and its vendees since 1861 is and has been unauthorized and wrongful, and that the said complainant should be required to account for the use and rents and profits thereof to the proper owners, respectively, during the time they have been in such possession, and he also expressly alleges and avers that all taxes whatever paid by said complainant have been paid by complainant voluntarily, with a knowledge of all the facts, and that the complainant is not entitled to have the same or any part thereof refunded.

And on this day, to wit, the 2d day of August, 1869, come the defendants, The Des Moines Navigation and Railroad Company, Samuel G. Wolcott, E. C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Electus B. Litchfield, Edward Wade, and John Stryker, by Ellwood, solicitor, and file in said cause the following answer to complainant's bill of complaint, to wit:

39 United States Circuit Court, District of Iowa. In Equity.

THE IOWA HOMESTEAD COMPANY, Complainant,

vs.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. Wolcott, Edwin C. Litchfield, Electus B. Litchfield, William J. McAlpine, Richard B. Chapman, Edward Wade, and John Stryker, Defendants to the Bill of Complaint of the Iowa Homestead Company, Complainant.

These defendants, The Des Moines Navigation and Railroad Company, Samuel G. Wolcott, Edwin C. Litchfield, Electus B. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Edward Wade, and John Stryker, now and at all times hereafter, saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or to so much and such parts and portions thereof as these defendants are advised is material for them to make answer unto, answer and say that the foregoing and annexed answer of Wm. B. Wells herein, save as herein otherwise stated and set forth, truly and correctly sets forth all the facts and contains all the averments and allegations relied upon by these defendants and each and every one of them as a defense to the said complainant's bill of complaint; that the said answer of said Wells and the admissions and denials and affirmative allegations therein contained are true to the best knowledge and belief of these defendants, and that these defendants adopt the said answer of the said Wells as their answer to the complainant's said bill of complaint, save and except as herein otherwise stated and set forth.

And these defendants, further answering, allege and aver that all the lands in and by the complainant's bill claimed to be in dispute

by and between the complainant and these defendants
40 were, by the State of Iowa, duly granted and conveyed to the said Des Moines Navigation and Railroad Company *by the State of Iowa*, as in the said answer of the said Wm. B. Wells fully stated and set forth; and that subsequent to such conveyance by the State to said Des Moines Navigation and Railroad Company the said company bargained, sold, granted, and conveyed to these defendants, respectively, separate and distinct tracts and parcels of said lands claimed by complainant, as will more fully appear by reference to the deeds or conveyances executed by said company to these defendants, respectively, and to which several deeds, for greater certainty, these defendants pray leave to refer, and that each and every of these defendants is a *bona fide* purchaser under the State of Iowa of the tract or tracts, respectively, conveyed to him by said company, and that he has full, complete, and indefeasible title thereto.

And these defendants deny that the said complainant is entitled to the relief claimed in his bill of complaint or any part or portion thereof, and aver and insist that by reason of the matters above and in the said answer of Wm. B. Wells, adopted and made a part thereof, contained the title of these defendants to the lands in dispute claimed by them, respectively, is perfect and absolute. All which matters and things these defendants are ready to aver, maintain, and prove as this honorable court shall direct, and they pray that their respective titles to the tracts claimed by them, respectively, may be confirmed and approved and declared valid, and that they be hence dismissed with their costs herein most wrongfully sustained.

FINCH & RIVERS AND
J. M. ELLWOOD,
Attorneys for Defendants Above Named.

And on the 13th day of May, A. D. 1870, there was filed in said cause the following stipulation of parties:

41 United States Circuit Court, District of Iowa.

THE IOWA HOMESTEAD COMPANY

vs.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, William J. McAlpine, Richard B. Chapman, Albert H. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John Stryker, and Others.

It is stipulated and agreed that the joint and several answers of the defendants, Albert H. Tracy, Francis Tracy, and Harriet Tracy, verified by Albert H. Tracy; the several answers of the defendant, Wm. B. Wells, sworn to by said Wells, and the joint and several answers of the defendants, Samuel G. Wolcott, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Electus B. Litchfield, Edward Wade, John Stryker, and the Des Moines Navigation and Railroad Company, sworn to by Electus B. Litchfield and Nathan

J. Higbee, be deemed and taken as the answer of the several defendants herein, and that all previous answers of the said defendants verified by their solicitors and filed herein be withdrawn from file.

To the several preceding answers the plaintiff filed a formal replication, putting in issue the several averments therein contained.

Stipulations Between the Parties.

In the Circuit Court of the United States.

IOWA HOMESTEAD COMPANY

vs.

THE DES MOINES VALLEY RAILROAD COMPANY *et al.*

It is agreed that the only questions submitted on this hearing are—

42 1. In which of the parties is the paramount title to the lands in controversy?

2. If the title shall be adjudged to be in the defendant, The Des Moines Navigation & Railroad Company, is the plaintiff entitled to be reimbursed the taxes which it has paid on the lands?

The amount of taxes paid is admitted to be $2,000. If the court shall find that the plaintiff is entitled to be so reimbursed, the question of the amount to be reimbursed shall be referred to a master, and the defendants shall have the right to show any counter-claims or matters which should be considered as reducing the amount to be reimbursed.

It is admitted that D. W. Kilborne was a director in the Des Moines Valley Railroad Company from 1862 to 1867. It is admitted that the Dubuque and Sioux City railroad was completed to Sioux City July 4th, 1870.

GRANT & SMITH,
Attorneys for Plaintiffs.
WITHROW & WRIGHT,
For D. M. N. & R. R. Co.
S. L. STRONG AND
WITHROW & WRIGHT,
For D. M. V. R. R.
C. C. NOURSE,
For R. S. Burrows.

And afterwards, to wit, on the 31st day of May, 1871, the following decree was rendered in said cause by said circuit court:

THE IOWA HOMESTEAD COMPANY

vs.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY *et al.*

The cause came on to be heard at the May term, 1871, of
43 said court, Grant & Smith for the plaintiff, and Ellwood, Nourse & Withrow for the Des Moines Navigation and Railroad Company and purchasers, and Withrow & Strong for the Des

Moines Valley Railroad Company; and the cause is heard upon the bill and amendments, answers, replications, agreements of counsel, exhibits, and depositions.

And thereupon it was ordered, adjudged, and decreed that the plaintiff's bill as to the lands in townships 86, 87, and 88, ranges 27, 28, 29, and 30, east and west of the Des Moines river and south of the second correction line, and townships 89, 90, 91, and 92, ranges 28 and 29, east of the Des Moines river, and the bill for relief for indemnity lands in lieu thereof, be dismissed.

And the bill for relief as to the lands in townships 89 and 90 north, range 28 and 29 west, on the west side of Des Moines river, be dismissed without prejudice, and that the plaintiffs pay the costs.

The following agreement was filed in said cause by the parties on the 20th day of October, A. D. 1871:

THE IOWA HOMESTEAD COMPANY

vs.

THE DES MOINES NAVIGATION & R. R. CO. *et al.*

It is agreed between the counsel for the complainants and defendants, who have appeared and answered, that the foregoing case was tried in the circuit court upon the bill, amendments, answers, replications, exhibits, and depositions offered by plaintiff and defendant at and in the foregoing record, which the parties agree to examine and correct when printed.

It is further agreed that the plaintiffs have all the title to the property in dispute which lawfully belonged to the Dubuque and Pacific Railroad Company or Dubuque and Sioux City Railroad Company, its assignee.

44 It is also agreed that either party should be authorized to read, either in the court below or in the supreme court, all acts, resolutions, and memorials, journals, or public documents of Congress or the State of Iowa which relate to the matter in controversy without offering them formally to the court, and use them in argument by proper reference.

It was also agreed that if either has omitted from their record any public record of the State or United States which relates to the matter in controversy the same may be read and considered in the appeal court by furnishing the adverse party with notice thereof thirty days before the argument, the object of both parties being to obtain a final adjudication of the questions made in the issues between the parties, or all the facts which belong to the same. And it is further stipulated that the defendants, Samuel G. Wolcott, Edwin C. Litchfield, Edward Wade, and John Stryker, each and every of whom are citizens of New York, and the Des Moines Navigation and Railroad Company, duly appeared in this court and filed their joint and several answers to complainant's bill, duly verified; that the said answers are not now found with the papers in this cause; that the said answers of said defendants were substantially in all respects like those of the defendants, Wm. B. Wells and Albert Tracy, on file

herein and duly verified by them, respectively, except such changes, variations, and alterations as were necessary to present the interests held by said defendants, respectively, in the land in controversy in this action.

And it is further stipulated and agreed that the said answer of defendant, Wm. B. Wells, verified by him, with the necessary changes, alterations, and variations, to show and present the proper and respective interest of defendants, Samuel G. Wolcott, Edwin C. Litchfield, Edward Wade, and John Stryker and Des Moines Navigation and Railroad Company, shall be taken
45 treated, and deemed the answer of said last-named defendants herein.

J. M. ELLWOOD,
For all the Defendants Represented.
WITHROW & WRIGHT,
For all the Defendants they Represent, Except the Des Moines Valley Railroad Company.
GRANT & SMITH,
For Plaintiff.

In the Supreme Court of the United States.

THE IOWA HOMESTEAD COMPANY

vs.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY *et al.*

To prevent unnecessary incumbrance of the record in this cause it is stipulated that the evidence in the court below established the following facts:

That on the 7th day of April, 1863, there was certified to the State to aid in the construction of the Dubuque and Pacific railroad lands as follows:

	56,573.32 acres.	
	21,061.91 "	
	1,382.32 "	
		78,917.25
And the 13th December, 1864		159.60

That the land certified on the 27th day of December, 1858, embraced none of the lands in dispute in this controversy, and no lands lying in odd-numbered sections within five miles of the Des Moines river.

That the lists made on the 7th of April, 1863, and the 13th of December, 1864, embraced the lands in dispute, except in-
46 demnity lands, and all were in odd-numbered sections within five miles of the Des Moines river. * * *

(Signed) WITHROW & WRIGHT,
For the Des Moines Navigation and Railroad Company, and the Des Moines Valley Railroad Company.
GRANT & SMITH,
For Plaintiff.

And on this day, to wit, the 13th day of May, in the May term, A. D. 1870, of said court, in the record of the proceedings thereof in said entitled cause there appears the following entry, to wit:

THE IOWA HOMESTEAD COMPANY, Complainant,

vs.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John Stryker, and Others, Defendants.

This action was commenced in the district court of Webster county, Iowa, at the October term of said district court. The defendants, Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, filed their affidavits, bond, and petition asking the removal of this action from said district court to this court under the provisions of the act of Congress, approved March 2d, 1867, entitled An act to amend an act for the removal of causes in certain cases from the State courts, approved July 27, 1866.

And it appearing to said district court that said Edwin C. Litchfield, Electus B. Litchfield, and John Stryker were non-residents of the State of Iowa and residents of the State of New York, and
47 that their application for the removal of this cause to this court is in all respects conformed to the requirements of said act of Congress, the said district court, at the October term thereof, in the year 1868, made the usual order transferring and removing this cause to this court as to the defendants, Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, and this cause as to said defendants — removed to this court for trial.

And it appearing that the defendants, Samuel G. Wolcott, Roswell S. Burrows, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, and Edward Wade, are each and every of them now residents of the State of Iowa and district of Iowa, and under the statute above referred to are also entitled to a removal of this cause from the State court, and that said defendants, with the express consent and approval of the plaintiff, have appeared and answered the bill herein and asked to be made parties defendant, and that their rights may be heard and determined in this court and on the trial of this action;

And it further appearing to this court that the defendants so asking to be made parties claimant hold under the same title as the defendants, Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, their defence is in all respects identical, with the said plaintiff consenting, it is ordered that said Samuel G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, and Edward Wade, and each and every of them, be made parties defendant herein; that the answer filed by said persons be taken and deemed their answer to the complainant's bill, and that by their appearance and answer herein the said persons be deemed and treated as de-

fendants herein and their rights in the premises adjudicated in and by this court in this action.

The defendant then read the following portions of said record:

48 *Notice Respecting Certain Lands in the State of Iowa.*

Notice is hereby given that the lands along the Des Moines river, in Iowa, and within the within-claimed limits of the Des Moines grant in that State, above the mouth of the Raccoon Forks of said river, which have been reserved from sale heretofore on *the* account of the claim of the State thereto, will continue reserved for the time being from sale or from location by any species of script or warrant, notwithstanding the recent decision of the Supreme Court against the claim.

This action is deemed necessary to afford time for Congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers holding under titles from the State, and to make such provision, by confirmation or adjustment of the claims of such settlers, as may appear to be right and proper.

General Land Office, May 18th, 1860.

JOS. S. WILSON,
Commissioner of the General Land Office.

Such notice was at once posted in a conspicuous place in said land offices in Iowa, and so remained posted until the close of the year 1863.

On 25th May, 1860, Wm. T. Steiger, an agent, in behalf of the Dubuque & Pacific Railroad Company, filed in the General Land Office a list of lands laying within the claimed limits of the Des Moines river grant above the Raccoon Forks, and claimed to select some of them for said railroad company under the act of 15th May, 1856, granting lands to Iowa for railroad purposes.

The Commissioner of the General Land Office, in June, 1860, acknowledged the receipt of the list, and added:

"The tracts in said list are above the Raccoon Forks and within the lands that had been selected under the Des Moines river grant by act of 8th of August, 1846, and in view of the recent decis-
49 ion of the Supreme Court affecting the title to lands under that grant above the Forks the present lists are presented by you. As the matter has been placed in train for congressional intervention, no action can be taken in the matter presented by you until Congress shall have had time to consider and dispose of the subject.

"Respectfully, your obedient servant,

"JOS. S. WILSON,
"*Commissioner.*"

On the 7th July, 1860, the Commissioner of the Land Office, in an official letter to the Secretary of the Interior in relation to the same subject, said:

"Without passing upon or, in fact, considering the question as to the right of the State under the railroad grant to these lands, which

at this date of the grant had been withdrawn from sale or location, the fact that Congress has taken incipient action in the matter of itself justifies us in not recommending further proceedings by the Department until after the close of the next session of Congress.

"Respectfully, your obedient servant,

"JOS. S. WILSON,

"*Commissioner.*"

On the 6th September, 1860, the Secretary of the Interior addressed the following letter to the Commissioner of the General Land Office:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *Sept. 6th*, 1860.

SIR: In the absence of any direct application by the Governor of the State of Iowa for final action in the certification of certain lands common to the claimed limits of the grant to that State for the improvement of the Des Moines river and the grants for aid in constructing railroads, my opinion is that it will be proper, as you suggest, to delay action until after the close of the next session of Congress.

50 The papers enclosed with your letter of the 7th July last and 3d instant are now returned.

Very respectfully, your obedient servant,

J. THOMPSON, *Secretary.*

The Commissioner of the General Land Office.

WASHINGTON, *June 1st*, 1860.

Hon. Joseph S. Wilson, Commis'r Gen'l Land Office.

SIR: Having been informed that the resolution introduced in the Senate by the Hon. Mr. Grimes, of Iowa, for confirming sales made by the State of certain lands on and near the Des Moines river, and for other purposes, S. R. No. 37, has just been referred by the Committee on Public Lands of the Senate to the Secretary of the Interior for his views, and is now before you for report, I respectfully ask, in behalf of the railroad companies, that the enclosed printed copy of the decision of the Supreme Court referred to in the resolution may be communicated to the committee; also that the companies may have the benefit of the facts that the lands in question were, by agreement, in adjusting the railroad grants at your office, placed in suspension, to await the decision of the courts, and that since the decision of the Supreme Court was rendered they have been claimed and selected for the railroads, and particular lists and maps thereof filed by me, as their agent, in the General Land Office.

I am, very respectfully, your obedient servant,

WM. T. STEIGER,
Agent, &c.

Notice Continuing Reservation of the Lands from Sale, May 18th, 1860.

Notice respecting certain lands in the State of Iowa.

51 Notice is hereby given that the lands along the Des Moines river in Iowa, and within the claimed limits of the Des Moines

grant in that State, above the mouth of the Raccoon Forks of said river, which have been reserved from sale heretofore on account of the claim of the State thereto, will continue reserved, for the time being, from sale or from location by any species of scrip or warrants, notwithstanding the recent decision of the Supreme Court against the claim.

This action is deemed necessary to afford time for Congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers holding under titles from the State, and to make such provision, by confirmation or adjustment of the claims of such settlers, as may appear to be right and proper.

General Land Office, May 18, 1860.

JOS. S. WILSON,
Commissioner of the General Land Office.

Steiger, Agent, &c., to Commissioner Wilson, May 25th, 1860.

WASHINGTON, *May 25th*, 1860.

Hon. Joseph S. Wilson, Comm'r General Land Office.

SIR: Referring to the recent decision of the Supreme Court of the United States on the Des Moines river improvement claim, I herewith transmit a list, marked C, of my selections of this date, for and on account of the Dubuque & Pacific railroad and branch under the act of 15th May, 1856, of the interfering lands in the Fort Dodge district, Iowa, within the six and the fifteen miles limits of said railroad grant heretofore held in suspension in our adjustment.

This list discriminates the lands conditionally approved for the river grant from those not yet approved in any list, and embraces as follows:

52

Whole quantity, 6-mile limits	59,418.22	acres.
15-mile "	73,729.35	"
Total	133,606.57	

Of which the quantity not yet approved all west of the river is as follows:

Not approved, 6-mile limits	15,456.47
15-mile "	16,214.12
Total	31,664.59

I also enclose a connected diagram, marked D, showing by the pink and yellow shades thereon the lands hereby selected.

Please acknowledge the receipt hereof.

Very respectfully, your obed't serv't,

WM. T. STEIGER, *Ag't*, &c.

Commissioner Wilson to Steiger, Ag't, &c., June 12, 1860.

GENERAL LAND OFFICE, *June 12th*, 1860.

W. T. Steiger, Esq., Washington, D. C.

SIR: I have to acknowledge the receipt of your letter of the 25th ult. enclosing lists and maps of lands selected and claimed under the railroad grant to Iowa by act of May 15th, 1856, for the Dubuque & Pacific railroad.

The tracts in said lists are above the Raccoon Forks, and within the lands that have been selected under the Des Moines river grant by act of 1846, and, in view of the recent decision of the Supreme Court affecting a title to lands under the grant above the said forks, the present lists are handed in by you.

As the matter has been placed in train for congressional intervention, no action can be taken in the matter presented
53 to you until Congress shall have time to consider and dispose of the subject.

Very respectfully, your obedient servant,

JOS. S. WILSON,
Commissioner.

Commissioner Wilson to Secretary Thompson, July 7th, 1860.

Hon. J. Thompson, Sec. of Interior.

SIR: I have the honor to return herewith the letter, dated 26th ultimo, from W. T. Steiger, agent, &c., asking that certain lands selected and claimed under the railroad-grant act to Iowa, of May 15th, 1856, may, without further delay, be certified to the State, and, pursuant to reference, respectfully submit that the lands referred to are embraced in certain lists filed in this office during the past month, in view of the recent decision of the Supreme Court affecting a title to lands under the Des Moines river grant of 1846, above the Raccoon Forks. The tracts in said lists are above the Raccoon Forks and within the lands that have been selected under the above-mentioned river grant.

Upon the receipt of these lists Mr. Steiger was advised that, as the matter had been placed in train for congressional intervention, no action could be taken by this office until Congress should have had time to consider and dispose of the subject.

Without passing upon or, in fact, considering the question as to the right of the State under the railroad grant to these lands, which at the date of that grant had been withdrawn from sale or location, the fact that Congress had taken incipient action in the matter of itself justifies us in not recommending further proceedings by the Department until after the close of the next session of Congress.

Very respectfully, your obedient servant,

JOS. S. WILSON,
Commissioner.

54 *Secretary Thompson to Senator Jones, Nov. 3d, 1860.*

Extract from a letter dated—

DEPARTMENT OF THE INTERIOR,
WASHINGTON, NOV. 3*d*, 1860.

SIR: I have the honor to acknowledge the receipt of your letter of this date, and have considered the same in connection with the letter of Mr. Steiger, agent of the Dubuque and Sioux City Railroad Company, of the 1st instant, both relating *the* to the certification to the State of Iowa of lists of odd-numbered sections of land within the six and fifteen mile limits of the railroad "from the city of Dubuque to a point on the Missouri river near to Sioux City."

For your information I herewith enclose copies of my letters of the 6th September last to the Commissioner of the General Land Office, and of the 1st of October to Mr. Steiger, and in reply to your letter would state that, as respects those tracts within the limits of the railroad grant which have already been certified to the State of Iowa by my predecessor, under the previous grant of 8th August, 1846, in the absence of a formal and sufficient surrender by the State of all claims under the prior grant, I deem it proper to suspend action at present so far as the claims interfere. The subject of these opposing claims is involved with proposed legislation pending in Congress, and the State authorities still assert the equity of the title which has been recognized by my predecessors, though since declared to be invalid by a decision of the Supreme Court of the United States.

* * * * * * *

Very respectfully, your obedient servant,
J. THOMPSON, *Secretary.*

Hon. Geo. W. Jones, of Iowa, present.

55 *Secretary Thompson to Governor Kirkwood, Nov. 3rd, 1860.*

Extract from a letter dated—

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *November* 3*d*, 1860.

His Excellency S. J. Kirkwood, Governor, &c., Des Moines, Iowa:

* * * * * * *

Again I would remark that, so far as any proposition for congressional aid in behalf — the State was brought to the notice of this Department during the last session of Congress, it was confined, as I understood it, to that portion of the claimed lands which have been heretofore certified by my predecessors, and which has not been included in the lists of lands ordered into market. In respect to this class of lands, I had the honor, in a communication of the 11th June last, addressed to Hon. R. W. Johnson, chairman of the Committee Public Lands of the United States Senate, to recommend the

report to that body, for adoption by Congress, the form of a joint resolution, as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That all the title which the United States still retain in the tracts of land along the Des Moines river and above the Raccoon Forks thereof in the State of Iowa which has been heretofore certified to said State improperly by the Department of the Interior as part of the grant by act of Congress approved August 8th, 1846, be, and the same is hereby, relinquished to the State of Iowa."

You thus perceive that, so far as my predecessors have acted under the grant of August 8th, 1846, I was willing to recommend a confirmation of that action by Congress. I cannot, however, go further.

Very respectfully, your obedient servant,

J. THOMPSON, *Secretary.*

56 *Joint Resolution to Quiet Title to Lands in the State of Iowa, Approved March 2d,* 1861. (12 *Stat. at Large, p.* 251.)

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That all the title which the United States still retain in the tracts of land along the Des Moines river and above the mouth of the Raccoon Forks thereof in the State of Iowa which have been certified to said State improperly by the Department of the Interior as part of the grant by act of Congress approved August 8th, 1846, and which is now held by *bona fide* purchasers under the State of Iowa, be, and the same is hereby, relinquished to the State of Iowa.

Approved March 2nd, 1861.

Pleas in the circuit court of the United States for the southern district of New York, held at the United States circuit court rooms, in the city of New York, in said district, of the term of April, in the year of our Lord one thousand eight hundred and sixty-five.

Witness the Honorable Samuel Nelson, justice of the Supreme Court of the United States.

KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Des Moines Navigation & Railroad Company, being a corporation created by and under the laws of the State of Iowa, and organized and residing in said State of Iowa, were summoned to answer Samuel G. Wolcott, a citizen of said State of New York, of a plea of breach of covenant; and thereupon the said Samuel G. Wolcott, plaintiff, by Jasper W. Gilbert, his attorney, complains of the said The Des Moines Navigation & Railroad Company, defendants, of a plea of breach of covenant, for that whereas heretofore, to wit, on
57 the eighth day of August, in the year of our Lord one thousand eight hundred and fifty-nine, at Des Moines, in the said State of Iowa, to wit, at the city of New York, in the said southern district of

New York, by a certain deed-poll then and there made by the said defendants, which said deed-poll, sealed with the seal of the said defendants, the plaintiff now brings into court here, the date whereof is the day and year aforesaid, it was witnessed: That the said defendants, in consideration of the sum of three thousand and forty dollars to them in hand paid by the said plaintiff, did thereby grant and convey to the said plaintiff the following tract of land in said State of Iowa, to wit, in Webster county, the east half of section seventeen, in township eighty-eight, range twenty-seven, containing three hundred and twenty acres; and the said defendant, in and by the said deed-poll, then and there, in consideration of the moneys aforesaid, did warrant the title of said land against all persons whomsoever, and did thereby covenant to and with the said plaintiff that the said defendants then had, and that the said plaintiff, by reason of the said deed-poll, did and would receive and take, a good and perfect title in fee to the said tract of land, as by the said deed-poll, reference being thereto had, will more fully and at large appear; yet the said plaintiff in fact saith that the said defendants then and there had no title whatever to the said tract of land nor any part thereof, and that the said plaintiff did not then or there, or at any any time afterwards, by reason of the said deed-poll or otherwise, receive, obtain, or take any title whatsoever to the said tract of land or any part thereof, but that the said defendants, to fulfill their said warranty of the title to said land, and to cause the said plaintiff to receive, obtain, or take a good and perfect title in fee to the said tract of land, although often requested so to do by the said plaintiff, have hitherto wholly neglected and refused, and still do neglect and refuse; of all of which the said defendants had notice; and so the said plaintiff in fact saith that the said defendants, although often requested, etc., have not kept the said covenants
58 so by them made as aforesaid, but have broken the same, to the damage of said plaintiff of ten thousand dollars, and thereof the said plaintiff brings his suit, etc.

And the said defendants, by W. & C. Tracy and Tallmadge, their attorneys, come and defend the wrong and injury when, etc., and, as to the supposed breach of covenant above assigned and alleged by the said plaintiff, they, the said defendants, say that the plaintiff ought not to have or maintain his aforesaid action thereof against them, the said defendants, because they say that they, the said defendants, before and at the time of the making of the said indenture in the said plaintiff's declaration above mentioned, were seized in fee of the said tract of land, and did then and there, by the said indenture, convey to the said plaintiff a good and perfect title in fee to the same; and this the said defendants are ready to verify. Wherefore the said defendants pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c. And for a further plea in this behalf the said defendants, by leave of the court here for the purpose first had and obtained, according to the form of the statute in such case made and provided, say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the said defend-

ants, after the making of the said indenture in the said declaration mentioned and before the commencement of this suit, to wit, on the first day of August, 1862, acquired and took a title and estate in fee in the said tract of land; which said last-mentioned title and estate, by the common law of the State of Iowa, and also by the statute of the State of Iowa, did forthwith enure to and vest in the said plaintiff, as the grantee of the said defendants, by the said indenture; and by means of the premises the said plaintiff, before the commencement of this suit, did receive and take good and perfect title in fee to the said tract of land, of all which the said plaintiff had notice, without this, that the said plaintiff has suffered any damage by means of anything in the said declarations mentioned; and this the said defendants are ready to verify.

59 Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

And the plaintiff, by his attorney aforesaid, as to the said plea of the said defendants by them first above pleaded, says that he, the said plaintiff, ought not, by reason of anything in that plea alleged, to be barred from having or maintaining his aforesaid action, because he says that the said defendants, at the said time when, &c., were not seized in fee of the said tract of land, nor did they convey to plaintiff any title thereto in any manner and form as in that plea in that behalf alleged; and this the said plaintiff prays may be inquired of by the country, &c.

And the said defendants do the like.

And the plaintiff, by his attorney aforesaid, as to the said plea of the said defendants by them secondly above pleaded, says that he, the said plaintiff, ought not, by reason of anything in that plea alleged, to be barred from having or maintaining his aforesaid action thereof, because he says that the said defendants did not, at the said time when, &c., acquire or take any title or estate, nor did such supposed title or estate vest in the said plaintiff, nor did the plaintiff receive or take any title whatever in manner and form as in that plea alleged; and this the said plaintiff — may be inquired of by the country, &c.

And the said defendants do the like.

Therefore it is ordered that the issues above joined be tried at the next term of the said circuit court, to be held at the court-rooms in said district above mentioned, commencing on the 3d Monday of October next, the same day as given to the parties aforesaid.

Afterwards, to wit, on the 27th day of October, in the term of October, in the year of our Lord one thousand eight hundred and

60 sixty-five, in the said circuit court, at the court-room thereof, in the city of New York, in said southern district of New York, before the Hon. Samuel Nelson, a justice of the Supreme Court of the United States, came *to* the parties aforesaid, by their attorneys aforesaid, and the jurors of the jury being summoned also came, who, to speak

the truth in the matter aforesaid in issue, being chosen, tried, and sworn, say, upon their oaths, that the defense by the said defendants above pleaded is true; and they find and return a general verdict in favor of the defendants aforesaid.

"Therefore it is considered by the court here that the said plaintiff take nothing by his said action, but that he be in mercy, etc., and that the said defendants go thereof without day, etc. And it is further considered that the said defendants recover against the plaintiff the sum of twenty-seven dollars and thirty cents for their costs and charges in and about their defence in this behalf expended, and that the said defendants have execution thereof."

Judgment signed this 31st day of October, A. D. 1865.

R. E. STILLWELL,
Deputy Clerk.

CITY AND COUNTY OF NEW YORK, *ss:*

In the Circuit Court of the United States for the Southern District of New York.

CALVIN BURR
ag'st
THE DES MOINES NAVIGATION AND RAILROAD COMPANY.

Calvin Burr, a citizen of the State of New York, complains of the Des Moines Navigation and Railroad Company, being a corporation created by and under the laws of the State of Iowa, and organized and residing in said State of Iowa, and being in custody, &c., of a plea of breach of covenant, for that whereas heretofore, to wit, on
61 the fifteenth day of November, in the year of our Lord one thousand eight hundred and fifty-eight, to wit, at Des Moines, in said State of Iowa, by a certain deed-poll there and then made by the defendants, which said deed-poll, sealed with the seal of said defendants, the plaintiff now brings into court here, the date whereof is the day and year aforesaid, it was witnessed: That the said defendants, in consideration of the sum of seventeen thousand eight hundred and sixty-eight dollars and eighty cents to them in hand paid by the said plaintiff, did thereby grant and convey to the said plaintiff the following tracts of lands in said State of Iowa, to wit, all of section nine, in township eighty-nine, range twenty-eight, and all of section twenty-one, in township eighty-nine, range twenty-eight, containing together twelve hundred and eighty acres; and the said defendants, in and by the said deed-poll, there and then, in consideration of — aforesaid, did warrant the title of said land against all persons whomsoever, and did thereby covenant to and with the plaintiff that the said defendants then had, and that the said plaintiff, by reason of the said deed-poll, did and would receive and take, a good and perfect title in fee to the said tracts of land and each thereof, as by the said deed-poll, reference being thereto had, will more fully and at large appear; yet the said plaintiff in fact saith that the said defendants then and there had no title whatever to the said tracts of land or either thereof nor any part thereof, and that the plaintiffs did not then or there, or at any time afterward, by reason of the said

deed-poll or otherwise, receive, obtain, or take any title whatsoever to the said tracts of land or either thereof, but that the said defendants, to fulfill their said warranty of the title to said lands and to cause the said plaintiff to receive, obtain, or take a good and perfect title in fee to the said tract of land, although often requested so to do by the said plaintiff, have hitherto wholly neglected and still do neglect and refuse; of all which the said defendants had notice; and so the said plaintiff in fact saith that the said defendants, although often requested to, have not kept the said covenants
62 so by them made as aforesaid, but have broken the same, to the damage of the said plaintiff thirty thousand dollars, and thereof the said plaintiff brings his suit, &c.

J. W. GILBERT,
Attorney for Plaintiff.

And the said defendants, by Tracy & Olmsted, their attorneys, come and defend the wrongs and injury, when, &c.; and as to the supposed breach of covenant above assigned and alleged by said plaintiff, then the said defendants say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, the said defendants, because they say that they, the said defendants, before and after the time of making of the said indenture in said plaintiff's declaration above mentioned, were seized in fee of the said tracts of land, and did then and there, by the said indenture, convey to the said plaintiff a good and perfect title in fee to the same; and this the said defendants are ready to verify. Wherefore the said defendants pray judgment if the said plaintiff ought to have or maintain his aforesaid action against them, &c.

And for a further plea in this behalf the said defendants, by leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the said defendants, after making the said indenture in the said declaration mentioned and before the commencement of this suit, to wit, on the first day of August, 1862, acquired and took a title and estate in fee in the said tracts of land; which last-mentioned title and estate, by the common law of the State of Iowa, and also by the statutes of the said State of Iowa, did forthwith enure to and vest in the said plaintiff, as the grantee of the said defendants by the said indenture, and that by means of the premises the said plaintiff, before the commencement of this suit, did receive and take a good and perfect title
63 in fee to the said tracts of land, of all which the said plaintiff had notice, without this, that the said plaintiff suffered any damage by means of anything in the said declaration mentioned; and this the said defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

United States Circuit Court, Southern Dist. of New York.

CALVIN BURR
ag't
THE DES MOINES NAVIGATION & RAILROAD COMPANY.

And the plaintiff, by his attorney aforesaid, as to the said plea of the said defendants by them first above pleaded, says that he, said plaintiff, ought not, by reason of anything in that plea alleged, to be bound from maintaining his aforesaid action, because he says that the said defendants, at the said time, when, etc., were not seized in fee of the said tracts of land, nor did they convey to the said plaintiff any title thereto in manner and form as in that plea in that *belief* alleged; and this the said plaintiff prays may be enquired of by the country, etc.; and the said defendants do the like.

And the said plaintiff, by his attorney aforesaid, as to the said plea of the said defendants by them secondly above pleaded, says that, is the said plaintiff or not, by reason of anything in that plea alleged, to be bound from having or maintaining his aforesaid action thereof, because he says that the said defendants did not, at the said time, when, &c., acquire or take any title or estate, nor did such supposed title or estate vest in the said plaintiff, nor did the plaintiff receive or take any title whatsoever in manner and form as in that plea alleged; and this the said plaintiff prays may be enquired of by the country, etc.; and the said defendants do the like.

J. W. GILBERT,
Plaintiff's Attorney.

64 Therefore the issues above joined are ordered by the circuit court of the United States for the southern district of New York to be tried at a stated term of said court appointed to be held at the city hall of the city of New York on the — day of ——, in the year of our Lord one thousand eight hundred and sixty-four, and place last above named, before Hon. —— Shipman, one of the justices of said court, according to the form of the statute in said case made and provided.

Came as well the above-named plaintiff as the above-named defendant, by their respective attorneys above mentioned; and the jurors of jury summoned to try the said issues, being called, also came, who, to speak the truth of the matters aforesaid being chosen, tried, and sworn, say, upon their oath, that the said defendant is guilty of the several breaches of covenant above laid to its charge, in manner and form as the said defendant hath above in that behalf alleged against the said defendant; and the said jury assess the damages of the said plaintiff, by reason of the premises, over and above his costs and charges by him in — *above* his suit in this behalf expended, to the sum of twenty-four thousand two hundred and fifty-five $\frac{76}{100}$ dollars, and for these costs and charges to six cents.

Therefore, it is considered that the said plaintiff do recover against the said defendant his said damages, costs, and charges by the jurors aforesaid, in form aforesaid assessed, and also thirty-eight and $\frac{35}{100}$ dollars for his costs and charges by the said court now here ad-

judged of increase to said plaintiff, and with his assent, which said damages, costs, and charges in the whole amount to twenty-four thousand two hundred and ninety-four and $\frac{11}{100}$ dollars.

And the said defendants in mercy, etc.

Judgment signed this 21st November, 1864.

R. E. STILLWELL,
Deputy Clerk.

65 The court then delivered to the jury the following charge:

GENTLEMEN OF THE JURY: You will see that the conclusions to which I have come upon the questions raised by the evidence in this case dispose of all except one, and that relative to the damages only, which I will submit to you. I therefore charge you—

1. That no title to the lands in question passed to the Territory of Iowa by virtue of the act of Congress — August 8th, 1846, these lands lying above the Raccoon Forks of the Des Moines river. This point has been already settled by the Supreme Court of the United States in the case of the Dubuque and Pacific Railroad Company *vs.* Litchfield, 23 of How. Rep., 66.

2. That none of the acts of the executive officers of the United States which have been proven, nor all of them taken together, had any effect to extend the operation of the act of August 8th, 1846, over these lands, nor in any manner to confer a title to them, either at law, or, strictly speaking, in equity, upon the Territory or State of Iowa, or upon these defendants. This result follows from the decision of the Supreme Court already cited.

3. That these acts of the executive officers of the United States, proven and relied on in this case, did not reserve to the United States these lands for the purpose of aiding in any other objects or internal improvements or for any other purpose whatever, and therefore they are not drawn within the proviso of the act of May 15th, 1856. Those of them which proceeded upon the idea that these lands were embraced in the grant of August 8th, 1846, were mere errors arising out of a misconstruction of the terms of that grant. They were, no doubt, made in good faith and for the purpose of formally fixing and defining rights supposed to have been already granted by Congress. But as these acts, according to the
66 case, 23d How., 66, exceeded the grant made by Congress, they were void. These acts were intended as acts of transfer and not acts of reservation. To now attribute to them the effect of having reserved these lands to the United States—that is, set them apart for the use of the Government itself—would be reserving the natural consequences originally intended to flow from them. Such a construction of these acts, I think, would be arbitrary and neither warranted by any circumstances presented by the evidence or by the settled rules of law. All these acts, therefore, left the lands in question in the same status in which they have always remained. That status was unchanged, not only in fact, but in contemplation of law. The lands were neither sold, granted, nor reserved to the United States for any purpose, but remained in the great body of

the public domain, subject to the control of Congress and to the operation of the laws in force regulating the disposition of the public lands.

4. If these views are correct, then the lands in question were embraced in the body of the act of May 15th, 1856, and the title passed by that grant to the State of Iowa in trust. The State took the lands in trust, and by an express provision of the act they were "to be applied to no other purpose whatever" than that of aiding in the construction of certain railroads therein named. It is unnecessary to say that the defendants' enterprise is not one of those named in the act as those to which the application of the lands granted is expressly restricted. Whether or not a title *in presenti* passed to the State on the passage of this act I do not deem it necessary now to determine; but I think it is quite certain that that act placed these lands in such a position that they were not reached by the resolutions of Congress of March 2d, 1861, and July 12th, 1862, upon which the defendants rely. To conclude otherwise would be to hold that these joint resolutions repeal *pro tanto* without any express provisions—by implication merely—the public act of May 15th, 1856. A construction by which the repeal of a statute
67 by implication is sought to be established is never favored, especially where private rights are concerned.

5. These views, being legal conclusions drawn from facts conceded in the case or established by uncontradicted evidence, cover the whole controversy, except the question of damages. It is my duty, therefore, to direct you to find a verdict for the plaintiff, and assess the damages which he has proven he has suffered from the failure of his title to these lands. The rule by which you will be guided will be the amount of the consideration paid, with interest from the day of payment to the present time, at the rate of six per cent. per annum.

The defendants' counsel excepted to that part of the charge concerning the effect of the act of August 8th, 1846, contained in the second proposition or section of said charge, and also excepted to that part of the charge contained in the third proposition or section thereof, and also excepted to that part of the charge contained in the fourth proposition or section thereof, and also to that part of the charge contained in the fifth proposition or section thereof.

The court thereupon charged and instructed the jury to find a verdict for the plaintiff; to which charge and instructions the defendants' counsel excepted.

The jury found a verdict in favor of the plaintiff, and assessed his damages at $24,254.00.

And because the said several exceptions do not appear by the record of the said trial, the said presiding judge, on the prayer of the defendants, has set to this bill of exceptions his seal the third day of November, one thousand eight hundred and sixty-four.

WILLIAM D. SHIPMAN. [L. S.]

Filed Nov. 21st, 1864.

Bond for Cost.

68 Docket entries and extracts from minutes Supreme Court of the United States in Samuel G. Wolcott, plaintiff in error, *vs.* The Des Moines Navigation and Railroad Company.

Docket Entries.

Supreme Court of the United States. December Term, 1864.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, Plaintiff in Error, *vs.* CALVIN BURR. } No. 336.

In error to the circuit court of the United States for the southern district of New York.

Chas. Tracy; P. Smith, for intervener.

1864, Dec. 10.—Record received and filed.

No. 221. December term, 1865. Docket entries continued:

1866, Feb. 8.—Motion of Mr. Allison for leave to intervene filed.
1866, Feb. 8.—Affidavit of J. M. McKinley filed.
" 13.—Leave granted to the Dubuque & Sioux City R. R. Co. to intervene, &c.
1866, Feb. 21.—Brief of P. Smith, for intervener, filed.

No. 133, of December term, 1869. Docket entries continued:

1866, Dec. 14.—Mr. J. F. Duncombe filed a motion to intervene, &c.
1866, Dec. 17.—Leave granted Mr. Duncombe to appear and file printed argument.
1866, Dec. 17—No. 204 to be argued with this case.
1867, Feb. 8.—Submitted with No. 204.
" May 13.—Reversed with costs and a venire awarded.

Supreme Court of the United States. Dec. Term, 1865.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, Plaintiff in Error,

vs.

CALVIN BURR.

69 Extracts from Minutes.

* * * * * * *

On consideration of the motion made and affidavit filed in this cause on the 8th instant, it is now here ordered by the court that leave be, and the same is hereby, granted counsel of the Dubuque and Sioux City Railroad Company to appear and be heard on the argument when this cause is reached.

13 February, 1866.

No. 133, of December Term, 1866.

* * * * * * *

THE DES MOINES NAVIGATION AND R. R. Co., Pl'ff in Error,
vs.
CALVIN BURR.

On consideration of the motion of Mr. Duncombe for leave to intervene, &c., in this case, it is now hereby ordered by this court that leave be, and the same is hereby, granted Mr. Duncombe to intervene in behalf of the Iowa Homestead Company in the argument of this cause, and to file a printed argument.

17 December, 1866.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, Plaintiff in Error,
vs.
CALVIN BURR.

Ordered by the court that No. 204, Samuel G. Wolcott, pl'ff in error, *vs.* Des Moines Navigation & R. R. Co., be argued by counsel, if desired, with No. 133, when reached in the regular call of the docket.

17 December, 1866.

70 THE DES MOINES NAVIGATION & RAILROAD COMPANY, Plaintiff in Error, *vs.* CALVIN BURR. } No. 133.

This cause was submitted to the court on the record and printed argument by Mr. Smith, of counsel for interveners, and stipulation of counsel filed to be considered with No. 204, submitted on printed arguments at the last term of this court.

8 February, 1867.

Supreme Court of the United States. December Term, 1866.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, Plaintiff in Error, *vs.* CALVIN BURR. } No. 133.

In error to the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of New York, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of said circuit court in this cause be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said circuit court, with directions to award a *venire facias de novo*.

Per Mr. Justice Nelson.

Mr. Justice Miller took no part in the decision of this case.

True copies of docket entries, extract from minutes, and judgments.

Test: [SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

71 Supreme Court of the United States. December Term, 1866.

THE DES MOINES NAVIGATION & RAILROAD COMPANY,
Plaintiff in Error,
vs.
CALVIN BURR. } No. 221.

In error to the circuit court of the United States for the southern district of New York.

The Dubuque & Sioux City R. R. Company, a corporation, etc., by Wm. B. Allison, its attorney, now comes and moves the court for leave to intervene in the above-entitled cause, and also for leave to file an argument in same for reasons set forth in affidavit filed herewith and made a part hereof.

DUBUQUE & SIOUX CITY
RAILROAD COMPANY,
By WM. B. ALLISON, *Its Attorney.*

True copy. Test:
[L. S.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

Supreme Court of the United States. December Term, 1865.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY,
Plaintiff in Error,
vs.
CALVIN BURR. } No. 221.

In error to the circuit court of the United States for the southern district of New York.

I, James McKinley, on oath say that I am an attorney and counsellor at law, and am assistant attorney of the Dubuque & Sioux City Railroad Company; that within the past few days, and not before, I have had an opportunity to examine the record in the case above named; that the said railroad company are materially interested in obtaining a correct decision of the principal point raised in said cause, and that I verily believe a decision of the point against
72 the above-named defendant in error would prejudice the interest of said Dubuque & Sioux City Railroad Company, although not a party to the record in the above-named case. The decision made by the court below (Hon. Wm. D. Shipman) is the point on which rests the title to above seventy-seven thousand acres of land granted by Congress to aid in the construction of said Dubuque and Sioux City railroad.

Further, that I have reason to fear that said Burr is not a *bona fide* litigant, but, on the contrary, is desirous of obtaining a decision against himself with a view to prejudicing the title of the Dubuque and Sioux City Railroad Company and their grantees.

Signature to the foregoing affidavit.

(Signed) JAMES M. McKINLEY.

Subscribed and sworn to before me, the clerk of the district court of Dubuque county, Iowa, this 1st day of February, 1866.

Witness my hand and official seal.

[SEAL.] (Signed) M. LEPPER, *Clerk.*

True copy. Test:

[SEAL.] D. W. MIDDLETON,
Clerk Sup. Court U. S.

(Endorsed as follows:) The Des Moines Navigation & Railroad Company, plaintiff in error, *vs.* Calvin Burr. Affidavit of James M. McKinley. Filed Feb., 1866. George B. Corkhill, clerk.

Motion on Behalf of the Iowa Homestead Company and Their Grantees to Intervene for the Purpose of Argument.

In the Supreme Court of the United States. Dec. Term, 1866.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, Plaintiff in Error,
vs.
CALVIN BURR, Defendant in Error. } No. 133. Land.

Now, to wit, December 14, 1866, comes the Iowa Homestead
73 Company and their grantees, of the State of Iowa, and by their attorney, John F. Duncombe, move the Court to permit said parties to intervene in this cause for the purpose of argument on the part of the defendant in error, and for the cause state—

1. That said company and their grantees are directly interested in the decision of this cause in this, to wit, said company and their grantees claim to be owners in fee-simple of the land named in the pleadings, and over fifty thousand acres of other lands, the title to which is involved in the decisions of the legal questions involved in this suit.

(Signed) J. F. DUNCOMBE,
Attorney for Intervener.

True copy. Test:

[SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

Endorsed as follows: Supreme Court U. S. December term, 1866. Des Moines Navigation and Railroad Company, plaintiffs in error, *vs.* Calvin Burr. Motion on part of Iowa Homestead Company to intervene for argument. Filed 14th day of December, 1866. Granted J. F. Duncombe, for interveners.

C.—Docket Entries and Extracts from Minutes Supreme Court United States in The Des Moines Navigation and Railroad Company, Plaintiff in Error, vs. Calvin Burr.

Supreme Court of the United States. December Term, 1865.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY. } No. 303.

In error to the circuit court of the United States for the southern district of New York.

J. W. Gilbert; P. Smith (for intervener); Chas. Tracy; Litchfield

74 Docket entries:

1865, Nov. 27.—Record received and filed.
" Dec. 21.—Stipulation to submit filed.
" " Brief of J. W. Gilbert, for the plaintiff in error, filed.
" " Brief of Litchfield, for the defendant in error, filed.
1866, Jan. 2.—Submitted under 20th rule.
" Feb. 8.—Motion of Mr. Allison for leave to intervene and also for leave to file printed argument.
" " Affidavit of J. M. McKinley filed.
" " 13.—Leave granted intervener to file argument before 1st of March.
" " 21.—Brief of P. Smith, for intervener, filed.
" " 26.—On motion of Mr. Cook, leave granted him to file argument before 1st March.
" Mar. 12.—Ordered to be continued to the next term, with leave to any of the parties to file additional arguments.
" " 23.—Brief of Mr. B. C. Cook, for intervener, filed.

No. 204, of December term, 1866. Docket entries continued:

1866, Dec. 4.—Reply brief of Litchfield filed.
" " 17.—Ordered that counsel have leave to argue this case with No. 133, if desired.
1867, May 13.—Adjudged to be affirmed with costs.

Extracts from Minutes.

Supreme Court of the United States. December Term, 1865.
No. 303.

* * * * * * *

75 SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY. } No. 303.

This cause was submitted to the consideration of the Court on the record and printed arguments by Mr. Gilbert, of counsel for the plaintiff in error, and by Mr. Litchfield, for the defendant in error, under the 20th rule.

2d January, 1866.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY. } No. 303.

On consideration of the motion made and affidavit filed in this cause on the 8th instant, it is now here ordered by the Court that leave be, and the same is hereby, granted counsel of the Dubuque and Sioux City Railroad Company to file and submit printed arguments in this cause at any time before the 1st day of March next.

13th February, 1866.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY. } No. 303.

On motion of Mr. B. C. Cook, leave granted him to file a printed argument in this cause by the first Monday of March next.

26th February, 1866.

76 December Term, 1866.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
DES MOINES NAVIGATION AND RAILROAD COMPANY. } No. 204.

Ordered by the Court that this cause be argued by counsel, if desired, with No. 133, when reached in the regular call of the docket.

Supreme Court of the United States. December Term, 1866.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY. } No. 204.

In error to the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of New York, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. Justice Nelson.

13th of May, 1867.

Mr. Justice Miller took no part in the decision of this case.

True copies of docket entries, extracts from minutes, and judgment.

Test:

[SEAL.]

D. W. MIDDLETON,
Clerk Supreme Court U. S.

77 Supreme Court of the United States. December Term, 1865.

SAMUEL G. WOLCOTT
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY. } No. 303.

The counsel for the plaintiff and the counsel for the defendant hereby agree to submit, and do submit, this case upon printed arguments.

Dated December 18th, 1865.

(Signed) J. W. GILBERT,
Of Counsel for Plaintiff.

(Signed) EDWIN C. LITCHFIELD,
Of Counsel for Defendant.

True copy. Test:
[SEAL.]
D. W. MIDDLETON,
Clerk Supreme Court U. S.

Endorsed as follows: Stipulation to submit. Filed December 21, 1865.

Supreme Court of the United States. December Term, 1865.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
DES MOINES NAVIGATION AND RAILROAD COMPANY. } No. 303.

In error to the circuit court of the United States for the southern district of New York.

The Dubuque and Sioux City Railroad Company, a corporation, and by Wm. B. Allison, its attorney, now comes and moves the Court for leave to intervene in the above-entitled cause as a party thereto, and also for leave to file an argument in same
78 for reasons set forth in affidavit filed herewith and made a part hereof.

DUBUQUE AND SIOUX CITY
RAILROAD COMPANY,
(Signed) By WM. B. ALLISON, *Its Att'y.*

True copy. Test:
[SEAL.]
D. W. MIDDLETON,
Clerk Supreme Court U. S.

Endorsed as follows: No. 303. Samuel G. Wolcott, plaintiff in error, *vs.* Des Moines Navigation and Railroad Company. Motion for leave to intervene on behalf of Dubuque & Sioux City Railroad Company. Filed 8th February, 1866. Wm. B. Allison.

Supreme Court of the United States. December Term, 1865.

SAMUEL G. WOLCOTT, Plaintiff in Error,

vs.

DES MOINES NAVIGATION & RAILROAD COMPANY.

In error to the circuit court of the United States for the southern district of New York.

I, James M. McKinley, on oath say that I am an attorney and counsellor at law, and am assistant attorney for the Dubuque & Sioux City Railroad Company; that within the past few days, and not before, I have had an opportunity to examine the record in the above-named case; that, to my mind, the said record shows that the attorneys of said Wolcott either did not fully understand their case or the nature of the party opposed to them, or had been instructed not to litigate the case in good faith; that the question involved in said case is one on which depends the title which the Dubuque & Sioux City Railroad Company acquired to about seventy-seven thousand acres of land to aid in the construction of said road; that
79 a final decision of the above-named case against the plaintiff in error would tend to greatly prejudice the said Dubuque & Sioux City Railroad Company, although they are not a party to the said case; that I have reason to fear the decision of the court below (near bottom of page 61 of the record) was obtained on substantially an *ex parte* presentation of the case, and is greatly prejudicial to the interest of the Dubuque & Sioux City Railroad Company, and is contrary to what would have been the decision on a proper presentation and argument of the case. And, as aforesaid, that an affirmance of the judgment of the court below would prejudice the title acquired by said Dubuque and Sioux City Railroad Company to said seventy-seven thousand acres of land and the title to their grantees.

(Signed) JAMES M. McKINLEY.

Subscribed and sworn to by James M. McKinley before me, clerk of the district court of Dubuque, Iowa, February 1, 1866.

Witness my hand and official seal.

[SEAL.] (Signed) M. LEPPER, *Clerk.*

True copy. Test:

[SEAL.] D. W. MIDDLETON,
Clerk Sup. Court U. S.

Endorsed as follows: No. 303. Samuel G. Wolcott, plaintiff in error, *vs.* Des Moines Navigation & Railroad Company. Affidavit of James M. McKinley. Filed 8th February, 1866.

CI.—The Argument of Platt Smith in Behalf of the Dubuque & Sioux City Railroad Company in Wolcott vs. The Des Moines Navigation & Railroad Company.

Supreme Court of the United States. December Term, 1866.

SAMUEL G. WOLCOTT, Plaintiff in Error,

vs.

DES MOINES NAVIGATION & R. R. Co., Defendants in Error.

Argument of Platt Smith, who intervenes in behalf of the Dubuque and Sioux City Railroad Company.

Both of these cases come up from the circuit court of the United States from the southern district of New York. They are both upon the same identical issues, and substantially upon the same state of facts. They are both suits brought against the Des Moines Navigation and Railroad Company to recover damages for alleged failure of title to certain lands in Iowa conveyed by the defendant below to the plaintiffs below by warranty deed. The plaintiffs below are citizens of the State of New York, and the defendant below is a citizen of Iowa.

The lands in dispute lie within five miles of the Des Moines river and above the mouth of the Raccoon Forks and in the alternate odd-numbered sections; and they also lie within the six and fifteen mile limits of the Dubuque & Sioux City Railroad Company, and are included in the act of Congress granting lands to Iowa, passed May 15th, 1856. The Des Moines Navigation and Railroad Company claim title to these lands under an act of Congress, passed August 8th, 1856, granting lands to Iowa to aid in the improvement of the navigation of the Des Moines River, and under grants and deeds from the State of Iowa to said company, and also under a joint resolution of Congress passed March 2d, 1861, and under an act of Congress passed July 12th, 1862.

The Dubuque and Sioux City Railroad Company claim title to the same lands under an act of Congress passed May 15th, 1856, granting lands to Iowa to aid in the construction of certain railroads and grants from the State of Iowa to the Dubuque and Pacific Railroad Company and conveyances from said company to the Dubuque and Sioux City Railroad Company.

Three questions are raised by the records in these causes:

First. Did the act of Congress passed August 8th, 1846, grant the lands in dispute to the State (then Territory) of Iowa
81 for the purposes specified in the act?

Second. Did the act of Congress of May 15, 1856, grant the lands in dispute to the State of Iowa for the purpose specified in said act, and did the act vest the title to said lands in dispute in the State of Iowa, or were the lands in dispute reserved to the United States, so that said act of May 15th, 1856, did not operate to vest them in the State of Iowa?

Third. Did the joint resolution of Congress passed March 2d, 1861, or the act of July 12th, 1862, pass the title to the lands in dispute to

the State of Iowa and through said State to the Des Moines Navigation and Railroad Company?

The first question was brought directly before this court in the case of The Dubuque and Pacific Railroad Company vs. Litchfield, and is reported in 23 Howard, 66.

The court, in an elaborate opinion, held that the act of Aug. 6th, 1846, did not grant to the State of Iowa any lands above the mouth of Raccoon Forks, and that the Des Moines Navigation and Railroad Company, under whom Litchfield claimed title, had no title to the lands in dispute. That decision must be a finality as far as the construction of that act is concerned. Yet the said Des Moines Navigation and Railroad Company have been making continued attempts to overturn that decision. The defendant Litchfield was the president of that company about the time of that decision. (See record, page 5, in the Samuel G. Wolcott case, now on hearing.) The judgment entered in the circuit court of Iowa upon the mandate of this court was set aside, and it required the peremptory mandamus of this court to have the judgment stand as the judgment of said circuit court. (Dubuque and Pacific Railroad Company, *ex parte*, 1 Wallace, 69.) A suit was then brought in circuit court of Iowa by Calvin Burr against said Des Moines Navigation and Railroad Company, involving the title to a portion of the same lands as in the present suit, and the case submitted upon an agreed statement
82 of the evidence. This case is recorded in 1st Wallace, 99. The Dubuque and Sioux City Railroad Company intervened in that case in this court and the case was dismissed.

It is clearly for the interest of the plaintiffs below in these cases to have the defendant obtain judgment on the question of title, for then they would hold their lands under their deeds. It is also to the interest of the defendant below to succeed, for if it can now succeed in procuring from this court an opinion that the title to the lands in dispute is valid it will give it some one hundred thousand acres of land now held by the Dubuque and Sioux City Railroad Company.

This very readily accounts for the reason that the defendant in the court below should voluntarily go to the State of New York and enter to an appearance to suits there, where it might be out of the way of the interference of the Dubuque and Sioux City Railroad Company.

The records in these cases show that there is no real contest between these parties to the suit, but that the real litigant against both parties is the Dubuque & Sioux City Railroad Company. The other railroad companies interested in the lands granted in the act of May, 1856, which cross the Des Moines above the Raccoon Forks, are also interested in the questions involved.

The second question can only be answered in the affirmative. The act itself vested the title to the lands therein described in the State of Iowa. Its language is, "That there be, and is hereby, granted to the State of Iowa, for the purpose," etc. This is a present grant. The particular lands granted are made certain by the location of the line of the road, and all the estate of the United States

passed by the act itself to the State of Iowa. We refer to a few of the authorities on this point, as it seems so well settled as to be beyond dispute. (United States *vs.* Brocks, 10 Howard, 442; Lassieur *vs.* Price, 12 Howard, 59; Dubuque & Pacific Railroad Company *vs.* Litchfield, 23 Howard, 66.)

83 In this last case the court, speaking of the act of August 8th, 1846, where the granting clause is the same language as the act of May 15th, 1856, used the following language: "The act of Congress was a direct grant to Iowa, in fee, of the undivided moiety of the whole tract on each side of the river from the Raccoon Forks to the Missouri line. Congress had the undoubted power to make the grant and vest the fee." The record in the case of S. G. Wolcott, p. 46, shows that said road was located on the 27th day of Sept., 1856, and the lands in dispute lie within the six-mile limit of the line of said road and the alternate odd-numbered sections. On the 14th day of July, 1856, the General Assembly of Iowa passed an act granting all the lands included in the act of May 15th, 1856, to aid in the construction of the railroad from Dubuque to a point on the Missouri river, at or near Sioux City, to the Dubuque & Pacific Railroad Company. The granting part is in the following language: "Are hereby disposed of, granted, and conferred to and upon the Dubuque & Pacific Railroad Company," etc. This is a grant *in presenti*, and vested the title to the lands in said company. Upon the location of the line of said road the title in the particular lands vested, and the United States had no remaining interest in them. On the 9th day of July, 1857, said company conveyed the lands in dispute, by deed of trust, to certain parties to secure bonds to be issued for the construction of the road, and on the — day of November, 1863, said Dubuque & Sioux City R. R. Company (which had become vested with the right and title of the Dubuque & Pacific Railroad Company in said lands) conveyed the same to George J. Forrest and others.

It is now claimed that the proviso to the first section of the act of May 15th, 1856, excepted the lands claimed by the Des Moines Navigation & Railroad Company from the operation of this grant. That proviso is as follows: "And provided further, That any and all lands heretofore reserved to the United States by an act of Con-

84 gress, or in any other manner by competent authority, for the purpose of aiding in any objects of internal improvements or for any other purpose whatever, be, and the same is hereby, reserved from the operation of this act," etc. It is not claimed that any act of Congress had reserved the lands in dispute to the United States, unless the decision in the case of The Dubuque & Pacific Railroad Company *vs.* Litchfield, 23 Howard, is erroneous and is to be overruled; but it is claimed that these lands were reserved to the United States by certain executive officers of the Government, and that the joint resolution of March 2nd, 1861, and the act of Congress of July 12th, 1862, vested these lands in the State of Iowa, and through it in said Des Moines Navigation & Railroad Company. The above proviso requires that the reservation be to some legal purpose and by competent authority. The only purpose claimed for such reservation was

to aid in the improvement of the Des Moines river, but this court held in the above case, in 23 Howard, that the lands in dispute were not reserved, and that no right in or to them passed by the act of Aug. 8, 1846. No reservation had been made by competent authority. The evidence set out in the record shows that prior to the act of May 15th, 1856, the proper executive officers of the Land Department of the United States had constructed the act of August 8th, 1846, as a grant extending above the mouth of the Raccoon Forks, and as including the lands in dispute; that the lands in dispute had been selected as within said grant, and that such selections had been approved by the proper executive officers of the United States. If these officers had the authority to make a reservation within the aforesaid proviso, and did make such reservation, then the Dubuque and Sioux City Railroad Company has never had any title to the said lands.

The absolute power and the right of disposition of the public lands of the United States is in Congress; no such right exists in any of the officers of the Government, unless specially conferred for some
85 particular purpose by act of Congress. The only authority conferred by act of Congress is the act of Aug. 8th, 1864, and this court has held that no right of reservation was conferred upon such officers by that act. In the case of 23 Howard, above quoted, the court says: "No authority was conferred upon the executive officers administering the public lands to do more than make partitions between the tenants in common, Iowa and the United States, in the manner prescribed by Congress. The premises in dispute lie sixty miles beyond the limits of the trusts granted. It was, therefore, impossible to make partition under this grant of lands lying outside of its boundaries, and all attempts to do so were merely nugatory." These officers never claimed or professed to reserve these lands to the United States by any right in themselves to do so, but only for the purpose of carrying into effect the act of August 8th, 1846. These officers have power to offer for sale and to suspend from sale the public lands of the United States as prescribed by law, but no authority is conferred upon them to reserve the public lands for any particular uses. On the 1st of June, 1849, the officers of the land office at Iowa City were directed to withhold from sale the lands in dispute. (See record in the Wolcott case, page 12.) These executive officers withheld these lands from sale, not as a reservation, but temporarily, till the construction of the act could be judicially decided. (See same record, pages 14 and 15, 26 and 37.) On the 10th day of May, 1856, just before the act of May 15th, 1856, was passed, all the land officers in Iowa were directed to suspend from sale all the lands in the several land districts. If a simple withholding of lands from sale or suspension of lands from sale by the executive officers is a reservation to the use of the United States for a particular purpose, then the State of Iowa acquired no title to any lands in Iowa or it acquired the title to all the lands in said land office districts, for all the lands were reserved from sale. We therefore insist that no reservation of the lands in dispute had been made by competent authority, and that the title to the
86 lands vested in the State, and that no act of the executive offi-

cers, or even of Congress, could divest the State of Iowa of such title after the acceptance of the grant by the State.

Third. We further claim that under the last question no title to the lands in dispute passed to the State of Iowa under the joint resolution of 1861 or the act of Congress of July 12, 1862, for the reason that the United States had no title to grant.

It had already divested itself of the title by the act of May 15th, 1856. No title could pass from the State of Iowa under the act of July, 1862, for the reason that a grant by a State is not a warrantee, and a subsequently acquired title does not inure to a grantee from a sovereign power. "Grants made by a Legislature are not warrantees, and the rule universally applied in determining their effect is that if the thing granted was not in the grantor at the time of the grant no estate passed to the grantee." (Brice *vs.* Railroad Company, 1 Black., 374.)

All the questions involved in these cases seem to have been fully settled by the prior adjudication of this court, and we trust that the decision in these cases will end litigation in regard to the title to these lands.

PLATT SMITH,
For Intervener.

Defendant then read from the deposition of John B. Thompson, filed Nov. 17, 1881, as follows:

I have sustained no official or business relation with the Dubuque & Sioux City Railroad Company, except that I have been a stockholder; I was the secretary and treasurer of the Iowa Homestead Company during its existence—from 1864 to June, 1873.

I don't know anything about Mason Thompson's connection with the Dubuque & Sioux City Railroad Company; I know there is such a man as Mason Thompson; I do not know in respect to his connection with the railroad company referred to in the question.

87 The homestead company had its regular board meetings as long as I was connected with it—up to June, 1873; I know of no meetings, independent of the board meetings, after 1873.

Soon after Jesup became president of the Dubuque & Sioux City Railroad Company the railroad company became owner of five-ninths of the stock of the homestead company, and after such change of ownership of the stock there was a new board of directors made of the homestead company; Morris K. Jesup, D. Willis James, J. Pierpont Morgan, and J. A. Roosevelt, George J. Forest, Edward Stimpson, and Isaac H. Knox were directors in the companies.

The railroad company owned a majority of the stock of the homestead company since the year 1866; I cannot say exactly what date; it was soon after the time that Morris K. Jesup became president of the railroad company; it might have been within two months or within a year after that date.

By owning a majority of the stock they controlled the homestead company, and they worked harmoniously with our board.

I know that after Jesup became president of the railroad com-

pany all stock of the homestead company held by the directors of the railroad company was transferred to the railroad company, amounting to five-ninths of the whole stock; I think it was within a year afterwards, but am not positive. In June, 1873, I sold the railroad company my stock—560 shares—and took the Dubuque & Sioux City Railroad Company's notes, payable in one, two, three, and four years, and as secretary of the company I can say they purchased at the same time the balance of the stock that was held by other stockholders, other than the railroad company, on the same terms. As to how much of the stock was owned by the railroad company on the 1st of Oct., 1868, I cannot answer, for the reason that I cannot fix the time when Jesup became president, and by whom the stock has been held since June, 1873; I cannot answer except as above.

88 Soon after Jesup became president there was transferred to the railroad company five-ninths of the entire stock of the homestead company, and in June, 1873, as before stated, the railroad company purchased from me and other owners the balance of the stock, making the entire stock of the homestead company; I think it was shortly after Jesup became president.

Q. State whether or not there was an agreement between said railroad company and said homestead company that, in case of failure of the title to the Webster county lands purchased by the latter of the former, that the railroad company would pay back to the homestead company the original cost, with ten per cent. interest thereon; and, if so, whether or not any record or memoranda of such agreement was or should have been recorded in the books of both or either of said companies; and, if so, in what book or books.

A. There was an agreement to that effect amongst the Iowa Homestead Company's papers; I don't think it was recorded in any book at all.

Q. Is it or is it not true that said railroad company paid the costs and expenses of the litigation in the case of the Iowa Homestead Company against the Des Moines Navigation & Railroad Company, commenced in the district court of Webster county, Iowa, in October, 1868, and taken by appeal to the Supreme Court of the United States to settle the question of title as to said Webster county lands? State fully all you know with respect to the payment of said costs and expenses, whether paid in full by said railroad company or jointly by said railroad company and said homestead company; and, if jointly, in what proportion the same were paid by them; and state further whether or not the matter of the payment of said costs and expenses, or provision therefor, was considered or discussed at any meeting of the board of directors of either of said companies at which you were present; and, if so, state whether or not both of said companies were represented at such meeting; and, if not both, whether or not said railroad company was represented at such meeting.

89 A. I cannot answer whether they paid them or not. They agreed to defend the title. The Iowa Homestead Company never paid a dollar of the expenses. It was never discussed at the

Iowa Homestead Company's meetings, and I know nothing about what was done in the railroad company's meetings. I have already stated that the railroad company owned a majority of the stock of the homestead company, and we were working harmoniously.

From W. J. Barneys' deposition, as follows:

I was land agent for the Iowa Homestead Co. from its organization up to some time in 1873. I have had no official relation at any time with the Dubuque & Sioux City Railroad Company.

Q. State whether or not you had, at the time of and previously to the commencement of the suit in the district court of Webster county, Iowa, by the Iowa Homestead Company against the Des Moines Navigation Company and others for the purpose of trying the title to certain land lying in Webster county, Iowa, claimed by said companies, respectively, and in which said homestead company sought as alternative relief the recovery of certain taxes paid by said homestead company, knowledge of the fact that said suit was and was to be commenced.

A. I had nothing to do with the suit mentioned, although I think it was mentioned to me that such suit would be brought. I neither directed nor participated in the direction of said suit. I don't recollect now exactly who were the officers of the Iowa Homestead Company at the time, but believe they were Morris K. Jesup, president, and John B. Dumont, secretary and treasurer. As to the directors, I have forgotten who they were. As to the officers of the railroad company, cannot say.

I don't think the Iowa Homestead Company paid taxes for 1861, '2, and '3. I think I paid all their taxes, and my accounts don't show that I paid such taxes for them.

90 From the deposition of George Crane, as follows:

Int. 14. Do you know whether or not the books of the D. & S. C. R. R. Co. contain any evidence now with respect to the payment of taxes on the lands in controversy in this suit?

Ans. I think they do for a certain year. The only year I looked for was a payment in 1866.

I have been the attorney of the plaintiff in this case since 1875 or 1876—possibly since 1874.

My correspondence was not with him, Goodnow, with respect to my employment in the first instance. I think it was with Dumont.

Int. 30. State whether or not you, either by correspondence or orally, communicated with Dumont on the subject before the date of the assignment from the homestead company to plaintiff Goodnow of the cause of action in this suit.

Ans. It is possible I did. I do not know how or when. I cannot recollect when the subject was first talked of without refreshing my memory. Dumont acted for my client; may possibly have had a conversation with him before the assignment was made. It may have been before my present client, Goodnow, so far as I know,

had any interest at all in the subject-matter of this present litigation. I presume it is true that it was before the assignment to him. What interest, if any, he had before that I don't know.

Int. 63. State whether or not your conversation with him, Dumont, related to both assignments, and whether or not in that communication, whatever its character was, he represented both companies.

A. I think we talked about the taxes for all the years. I cannot say that he represented either company as a matter of fact, only we talked over the subject-matter of the recovery of those taxes, and if he was acting for the company—that is, representing the company—I did not know it.

91 From George J. Forest's deposition, as follows:

I have been a stockholder in the Dubuque and Sioux City Railroad Company for many years. I have no interest in its property to-day. I was not a director. I or my firm were stockholders in the homestead company, and I have been told that I was a director and an officer. I have no distinct recollection of my official capacity in the company.

Q. State whether or not you had, at the time and previously to the commencement of the suit in the district court of Webster county, Iowa, by the Iowa Homestead Company against the Des Moines Navigation and Railroad Company and others for the purpose of trying the title to certain lands lying in Webster county, Iowa, claimed by said companies, respectively, and in which said homestead company sought as alternative relief the recovery of certain taxes paid by the said homestead company, knowledge of the fact that said suit was or was to be commenced.

A. I have no recollection of any such suit.

Q. State whether or not if you were present when the assignment by either said homestead company or said railroad company to Goodnow was made; and, if so, whether said Goodnow was present, and when were said assignments or either of them made.

A. I was not present; I do not know whether Goodnow was present or not.

Q. State whether or not you arranged with said Goodnow for the making to him of either of said assignments; and, if so, state whether the same was done orally or by correspondence, and what interest, if any, said Goodnow has in the claims so assigned to him or either of them.

A. I did not.

Q. State by what authority the assignment of the cause of action herein to the plaintiff Goodnow was made; whether or
92 not it was authorized at and by any meeting of the stockholders, directors, or of any committee of the assignor; and, if so, by which and when, and where was such meeting held and who composed the same?

A. I know nothing about it.

From Mason Thompson's deposition, as follows:

I am a director of the Dubuque and Sioux City Railroad Company. I have been connected with such direction four or five years. I am also a director of the Iowa Homestead Company, and have been so during the same period. I acted as president *pro tem.* of that company for a short term during the absence of the president. The board of directors of the Iowa Homestead Company have not held any separate meetings as such, and the directors of both companies are the same persons. I understand that the railroad company owns a majority of the stock of the homestead company, and has controlled its affairs ever since my connection with the company, and, as the railroad company own the lands, any discussion in regard to them or any matters in reference to the homestead company have been had at the meetings of directors of the Dubuque and Sioux City Railroad Company.

Q. State whether or not you had, at the time of and previously to the commencement of the suit in the district court of Webster county, Iowa, by the Iowa Homestead Company against the Des Moines Navigation & R. R. Co. and others for the purpose of trying the title to certain lands lying in Webster Co., Iowa, claimed by both companies, respectively, and in which said homestead company sought as alternative relief the recovery of certain taxes paid by said homestead company, knowledge of the fact that said suit was or was to be commenced.

A. I do not know anything about any of these matters of eight years ago.

Q. State where the plaintiff, Edward K. Goodnow, resides,
93 and what official or other business relation, if any, he sustains to the said homestead or said railroad company.

A. He is a partner of Mr. Jesup, who is president of the Dubuque and Sioux City Railroad Company, and has an office with him. I do not know where he resides. I do not know that he is officially connected with either of said companies. I know he is not an officer or director of either of said companies.

Q. State whether or not you were present when the assignment by either said homestead company or said railroad company to Goodnow was made; and, if so, whether said Goodnow was present, and when and where were said assignments or either of them made.

A. I know nothing in respect to the matters inquired of.

Q. State by what authority the assignment of the cause of action herein to the plaintiff Goodnow was made; whether or not it was authorized at and by any meeting either of the stockholders, directors, or any committee of the assignor; and, if so, by which and when, and where was such meeting held and who composed the same?

A. I know nothing in respect of the matters so inquired of and cannot answer that question.

Q. State, if you can, which of said companies, the homestead company or the railroad company, furnished the money in the first instance with which the taxes on said Webster county lands for

the years 1861, '62, and '63 and each thereof were paid, and whether or not the same was so furnished for the use of the company so furnishing the same; and, if not, for whose use was it furnished, and what adjustment, if any, was subsequently made with respect thereto?

A. I have no personal knowledge in respect to this matter inquired of. The matter, however, has been talked over at the meetings
94 of the board when I was present, and I understood from these conversations that the matter was referred to the officers for them to bring suit and to take whatever measures were necessary. I supposed the taxes had been paid, and these suits were for the purpose of recovering them back. This occurred in the meeting of the board of directors of the Dubuque and Sioux City Railroad Company. These conversations referred to have occurred within the last three or four years.

From John B. Thompson's deposition, filed November 19th, 1881:

I have never had any connection with the Dubuque & Sioux City Railroad Company. I was, however, secretary and treasurer of the Iowa Homestead Company from 1864 to 1873.

Q. State whether or not you had, at the time of and previously to the commencement of the suit in the district court in Webster county, Iowa, by the Iowa Homestead Company against the Des Moines Navigation Company and others for the purpose of trying the title to certain land lying in Webster county, Iowa, claimed by said companies, respectively, and on which said homestead company sought as alternative relief the recovery of certain taxes paid by said homestead company, knowledge of the fact that said suit was *and* was to be commenced.

A. I have no knowledge of there being any disputed title to the lands. I cannot now recollect whether I had knowledge of the fact that such suit was or was to be commenced.

Q. If, in answer to the last interrogatory, you say you had knowledge of the suit therein referred to at the time of its commencement, state whether or not you directed or participated with others in directing its commencement; and, if so, state the names of all the officers of said homestead company and said Dubuque & Sioux City Railroad Company, as far as you can remember, with whom you consulted about the commencement of the same before it was commenced.

95 A. I cannot answer clearly. I suppose it must have been by action of the board directing the secretary and treasurer to bring the suit. Not having the books I cannot make any references to them. I know that there were no entries on our books for taxes of 1861, 1862, and 1863. The Iowa Homestead Company paid the taxes regularly from 1864 up to 1873, when my connection with the company terminated. I cannot answer where they (the tax receipts) are now. I gave them up in 1873 to the Dubuque & Sioux City Railroad Company. I think there were no taxes paid by the homestead company, to my recollection, from 1859 till 1864.

I only know him (the plaintiff, Edward K. Goodnow) as a partner of Morris K. Jesup & Co. I do not know him in connection with either of these companies.

I know nothing about the assignment of the claim sued upon to plaintiff, and was not present when it was made; don't know by what authority it was made.

The Iowa Homestead Company held a warrantee deed from the Dubuque & Sioux City Railroad Company, and in addition they held an agreement that they (the railroad company) would defend the title at their own expense, which they did.

From Morris K. Jesup's deposition, as follows:

I am president of the Dubuque & Sioux City Railroad Company, and have been since the early part of 1866. I have no relations with the Iowa Homestead Company officially, and never have had.

Who on behalf of said railroad company had the chief control and direction of said suit, and who employed, consulted with, and generally gave instructions to the attorneys who had charge of it?

I am president, and I presume if any directions were given I must have given them; I do not know.

96 He (Edward K. Goodnow, the plaintiff) resides in Brooklyn. I am not aware that he sustains any official relations with either the land company or the railroad company.

Q. State whether or not you were present when the assignment by either said homestead company or said railroad company to Goodnow was made; and, if so, whether said Goodnow was present, and when were said assignments or either of them made.

A. I do not recollect anything about it.

Q. State whether or not you arranged with said Goodnow for the making to him of either of said assignments; and, if so, state whether the same was done orally or by correspondence, and what interest, if any, said Goodnow has in the claims assigned to him or either of them.

A. Not that I remember; I have no recollection of any arrangement between Mr. Goodnow and the Iowa Homestead Company or the railroad company at all.

Q. State by what authority the assignment of the cause of action herein to the plaintiff Goodnow was made; whether or not it was authorized at and by any meeting, either by the stockholders, directors, or any committee of the assignor; if so, by which and when and where was such meeting held; who composed the same?

A. I have no recollection of anything of the kind; I presume, however, if anything of the kind was done it was done by the board of directors; I remember nothing about it.

I do not remember of any record of the proceedings authorizing said assignment having been made.

From J. B. Dumont's deposition, as follows:

I have been assistant secretary of the Dubuque & Sioux City R R. Co. since some time in 1864, and treasurer since some time in June, 1876, and secretary of the Iowa Homestead Company since some time in 1873.

97 Q. State whether or not at any time during the years 1874, 1875, and 1876 you had a conversation with George Crane, Esq., at the city of Dubuque, Iowa, with respect to the commencement of a suit or suits for the recovery of the taxes or any part of them paid by the Iowa Homestead Company and said railroad company from the year 1859 to the year 1872, both inclusive, or either of them; if so, state what was said in said conversation about assigning the claims, respectively, of said companies, or either of them, to Mr. Edward K. Goodnow or to any other person, that the same might be sued in name of the assignor.

A. I have no recollection of any such special conversation; Mr. Crane was counsel of the Dubuque & Sioux City Railroad Company, and it is not unlikely that I had some conversation with him; I do not remember what was said. The plaintiff Goodnow resides in Brooklyn, N. Y., and sustains no official or business relations with either company. I do not remember being present when the assignments were made; I do not know whether he (Mr. Goodnow) was present or not; I do not remember when they or either of them were made.

Q. State by what authority the assignment of the cause of action herein to the plaintiff Goodnow was made; whether or not it was authorized by any meeting either of the stockholders, directors, or of any committee of the assignor; and, if so, by which and when and where was such meeting held, and who composed the same.

—. The records of the company are in Dubuque; I do not know; I cannot state by what authority. I cannot state whether any such record of the proceedings authorizing said assignment was made, as the records of the company are in the Dubuque office.

The plaintiff then offered in evidence the original assignments.

They were objected to by defendants because—

98 1. There is no evidence of the authority of the officers by whom it purports to have been executed to execute the same.

2. There is no evidence of the execution of the same by the officers.

3. There is no certificate of acknowledgment as to the assignment relied upon in this case.

—. The assignment purports to have been made in the State of New York by an Iowa corporation, and no authority is shown for them to transact business outside of the territory creating them.

5. For the reason that the instrument shows it was executed long after these suits were commenced, and there is no evidence that the assignments were ever delivered by the railroad company to the plaintiff.

The assignment, a copy of which is attached to the plaintiff's petition and marked Exhibit B, was read in evidence.

Plaintiff then read in evidence a duplicate of the assignment attached to said petition and the following acknowledgment thereof:

STATE OF NEW YORK, *New York City and County:*

On this 8th day of April, A. D. 1881, before me, a notary public in and for said county, personally came M. K. Jesup, president of the Dubuque and Sioux City railroad, and John B. Dumont, secretary of said company, to me personally known to be the identical persons whose names are affixed to the above instrument as grantors and officers of said company, and acknowledged the same to be their voluntary act and deed and the voluntary act and deed of said railroad company for the uses and purposes therein mentioned.

Witness my hand and notarial seal.

[NOTARIAL SEAL.] J. C. FRENCH,
Notary Public, Kings County.

99 DEPARTMENT OF THE INTERIOR,
WASHINGTON, *October* 1, 1860.

SIR: In reply to your letter of the 29th ultimo, I have to inform you that a letter was addressed to the Commissioner of the General Land Office on the 6th of that month, which was responsive to your application of the 26th June last for the certification of lists of certain lands to the State of Iowa under the grants for aid in constructing railroads in that State.

A copy of my letter is now enclosed with the remark that in the reports of the Commissioner of the General Land Office of the 7th of July and 3d of September therein referred to it is not stated whether the lands which you desire to have listed under the railroad grant are or are not in whole or part such as have already been certified to the State erroneously under the grant for the improvement of the Des Moines river. I make this remark deeming it probable that the Commissioner's objections, as my own, have been chiefly restricted to lands that have been heretofore erroneously certified and not to all that have been illegally claimed under the Des Moines grant.

Very respectfully, your obedient servant,
J. THOMPSON, *Secretary.*

WASHINGTON, *September 26th*, 1860.

Hon. Joseph S. Wilson, Commissioner General Land Office.

SIR: Understanding that the Hon. Secretary of the Interior hesitates to comply with my requests of the 26th of June last for the approval of the Des Moines river lands in Iowa enuring to the railroads because it does not appear that the Governor has requested the same, I beg leave to state that the duly authorized agent of the Governor (Mr. Henn), as you are personally aware, did request that these lands should be approved to the roads, and that on Mr. Henn's leaving Washington I had full power to act in his stead,
100 which I have since done, and my acts have been recognized.

I am likewise authorized by the several companies, the assignees of the State, to do the specific act as well as others.

I make the above statement in order to guard against errors and to disabuse the mind of the Secretary on the point mentioned, and

through you, under the circumstances, respectfully renew my previous request.

Very respectfully, your obedient servant,

WM. T. STEIGER,
Agent, etc.

WASHINGTON, *June 26th*, 1860.

Hon. Jacob Thompson, Secretary of the Interior.

SIR: Immediately after the recent adverse decision of the Supreme Court of the United States on the Des Moines river claim to lands above the Raccoon Forks in the State of Iowa, as the agent of two of the railroads I filed in the General Land Office lists of selection of the interfering lands thus enuring to the roads in order that they might be approved and certified in the usual form.

The Commissioner of the General Land Office, in acknowledging the receipt of the lists, informed me that the matter, alluding to the Des Moines river conflicting claim, having been placed in train for congressional intervention no action could be taken at present upon my application.

Since the adjournment of Congress I have taken particular pains to ascertain what, if anything, had been done, and find that the Committee on Public Lands of the Senate, before whom this matter was pending, have taken no further action upon it since your communication to them of the 11th instant. It will, therefore, under the general rule adopted by the Senate relating to unfinished business, be carried over to the next session.

The difficulty of reporting at the present session, as far as I
101 can learn, had no reference to the rights of the railroads, or doubts as to the correctness of the view expressed by the Department on the 11th instant, that since the decision of the Supreme Court those rights can no longer be called in question, and that they thus save the lands to the State, but whether or not it would be proper or expedient to recommend a grant of lands in addition to those already granted, and, if so, to what extent, as proposed in the resolution substituted by the Department and the several bills and resolutions before the committee having a similar object.

As these lands, for the cause mentioned, have been held suspended from the commencement of the adjustment of the railroad grants, more than three years ago, to the serious disadvantage of the railroad companies, and it is now admitted that there can be no question as to the right of the State to them, under the act of May 15th, 1856, I most respectfully but earnestly request that there may be no further delay in certifying the proper lists to the State and the railroad companies in order that the latter may at once avail themselves of the aid and benefit derived from them in the prosecution of their respective works, as intended by the original grant.

As an additional reason for granting my requests, I beg leave to suggest that if delayed for legislation of Congress at its next session, even should expectation of relief not then be disappointed, it would postpone any final action until after the 4th of March, or to the next administration; how much longer no reasonable calculation

could be made, as it is fair to presume that the new officials would require some time to acquaint themselves with all the facts. This course, if followed, would be as ruinous as it would be unjust to the railroad companies, who are firmly bound to the State, and through it to the United States, for the faithful performance of all the conditions of the grant, including the completion of the roads in the time specified. Besides, whatever the
102 future legislation of Congress may be, it would undoubtedly save our vested rights in the lands, and therefore not interfere with the approval now asked of the Department.

I am, with great respect, your obedient servant,

WM. T. STEIGER,
Agent, etc.

Endorsed:

DEPARTMENT OF THE INTERIOR, *June 28th*, 1860.

Respectfully referred to the Commissioner of the General Land Office for report.

MOSES KELLY,
Chief Clerk.

Commissioner Wilson to Secretary Thompson, September 3rd, 1860.

GENERAL LAND OFFICE, *September 3rd*, 1860.

Hon. J. Thompson, Secretary of Interior.

SIR: I have the honor to return herewith the communication from W. F. Steiger, Esq., of the 10th July last, relative to his application for the certification of certain lands above the Raccoon Forks of the Des Moines river to the Iowa railroads, and respectfully state that we find no reason therein for a change of our recommendation of the 7th July last; that further proceedings in the matter by the Department be delayed until after the close of the next session of Congress.

Very respectfully, your obedient servant,

JOS. S. WILSON,
Commissioner.

103 *Secretary Thompson to the Commissioner of the General Land Office, September 6th*, 1860.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *Sept. 6th*, 1860.

SIR: In the absence of any direct application by the Governor of the State of Iowa for final action in the certification of certain lands common to the claimed limits of the grant to that State for the improvement of the Des Moines river, and the grants for aid in constructing railroads, my opinion is that it will be proper, as you suggest, to delay action until after the close of the next session of Congress.

The papers enclosed with your letter of the 7th of July last and 3d instant are now returned.

Very respectfully, your obedient servant,

J. THOMPSON, *Secretary.*

GEORGE CRANE, being sworn, testified as follows:

I am rather familiar with the handwriting of Morris K. Jesup. I was not present when the assignment was executed.

My judgment would be that the signature is in the handwriting of Morris K. Jesup.

I am not positive whether the assignment was transmitted to Mr. Jesup by me or not; I think I received it back from him; I do not recollect now of having any correspondence with Mr. Jesup upon the subject of the assignment.

104 The appellee, deeming the abstract prepared by the appellant imperfect, files the following additional abstract in this case:

Appellee's Additional Abstract of Record.

On the trial of this cause in the court below the plaintiff read in evidence from the printed transcript of the record in the Supreme Court of the United States in the case of the Iowa Homestead Company against the Des Moines Navigation and Railroad Company and others, referred to in the agreed statement of facts, the bill of complaint, in the words and figures following:

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY and Others.

To the district court of the county of Webster, in the State of Iowa:

The petition of the Iowa Homestead Company and others —:

1. That said company is a corporation duly created by the laws and a citizen of the State of Iowa for the purpose of buying and selling lands in said State; that said plaintiffs, by deed of purchase, beginning the 12th day of November, 1863, acquired by and through the Dubuque & Sioux City Railroad Company all the right of said company, the Dubuque & Pacific Railroad Company, and the State of Iowa to about fifty thousand acres of land lying on the east side of the Des Moines river, in Webster and Humboldt counties, Iowa, being the odd sections of land within the limits of the Dubuque & Pacific railroad grant of 1856 and the Des Moines river grant of 1846. A copy of the said list of lands is hereunto annexed and made part of this bill; and by said deeds and certificates the plaintiffs acquired a title to about twenty thousand acres of land in the

105 odd sections within said grants in Webster and Hamilton counties west of said Des Moines river, a list of which is hereto annexed and made a part of this bill. Of these lands the fifty thousand acres lying east of the Des Moines river are claimed by the Des Moines Navigation and Railroad Company, a corporation created by the laws of Iowa, and its assignees; and some title or claim to twenty thousand

acres of land on the west side of the river is or has been made by the Des Moines Valley Railroad Company, a corporation created by and a citizen of the State of Iowa.

2. That on the 8th of August, 1846, by an act of Congress, a grant of land was made to the Territory of Iowa of alternate sections of land within five miles of the Des Moines river in said State to improve the navigation from its mouth to the Raccoon Forks, said land to be selected within said Territory by an agent to be appointed by the Governor, subject to approval by the Secretary of the Treasury of the United States; said lands to become the property of the State when admitted into the Union, which event occurred about a year after. On the 17th of October, 1846, the Governor of the Territory of Iowa was notified by letter from the Commissioner of the Land Office "that under the grant the Territory of Iowa was entitled to the vacant lands in alternate sections within five miles on each side of the Des Moines river from the northern boundary of Missouri to the Raccoon Forks." The territorial and State authorities acquiesced in the opinion expressed in this letter, and an agent was appointed to make selections and he did make the selections below the forks of the Raccoon. No question arose as to the further extent of this grant until nearly two years thereafter. On the 24th of February, 1847, the State of Iowa appointed a board of public works to improve the navigation of said river. In a letter to the secretary of this board, dated February 23, 1848, R. M. Young, Commissioner of the General Land Office, after answering a letter to him on other subjects, says: "A question has arisen as to the extent of the grant to Iowa under act of August 8th, 1846, and the opinion of the office requested.

106 "The grant is one of equal moiety in alternate sections, and on each side of said river, to be selected within said Territory, &c., the proceeds to be applied to improve the navigation of the river from its mouth to the Raccoon Forks. Hence the State is entitled to the alternate sections within five miles of the Des Moines river throughout its whole extent within the limits of Iowa."

On the 19th of June, 1848, a proclamation was issued by the President, and countersigned by said Young, ordering into market some of the lands in the odd sections above the Raccoon Forks, which, under the expressions of the letter of February 23, belonged to the State.

The board of public works in Iowa protested against this, but no notice was taken of it by said Young. On the 8th of January, 1849, the delegation from Iowa in Congress called the attention of the Secretary of the Treasury to the constructions of the act of August 8, 1846, and claimed the alternate sections of land on the said river above the forks of the Raccoon. The Secretary of the Treasury, R. J. Walker, in reply to this letter, on the 2d of March, 1849, conceded that the grant extended to the source of the river, which would include a large part of what is now the State of Minnesota, and would make the grant nine hundred thousand acres of land.

On the 2d of March, 1849, Walker, Secretary of the Treasury,

by letter, advised Young, Commissioner, of this opinion, and on June 16, 1849, Young directed the proper land officers to withhold the lands from sale in the odd-numbered sections. On the 19th of December, 1849, Butterfield, Commissioner, informed Jesse L. Williams, secretary of the board of public works, that no selections had been made above the forks.

On the 14th of January, 1850, the Commissioner of the Land Office informed Ewing, Secretary of the Interior, a new officer created by law and taking charge of the public lands, that a list of land charged against Iowa amounted to 825,078 acres, and
107 that when adjusted the amount between the Raccoon Forks and source of the river was estimated to contain 900,000 acres.

On the 13th of March, 1850, the said Commissioner submitted to Ewing, Secretary, three lists of lands, the first of which showed the tracts falling within the limits of the grant above the Raccoon Forks, under the decision of the Secretary of the Treasury of March 2, 1849. On the 6th of April, 1850, Ewing, Secretary of the Interior, reversed the opinion of Walker, held that the grant did not extend above the forks, refused to confirm the selection of March 13, and required the Commissioner to report to Congress that that body, if it saw fit, might extend the grant.

On the 14th of April, 1850, the Senators and Representatives from Iowa appealed from that decision to the President. The President, Taylor, referred the question to Reverdy Johnson, Attorney General, who, on the 19th of July, 1850, gave his opinion that the grant extended above the forks to the source of the river. Before this opinion was delivered the President died, a new Cabinet was appointed, and, instead of giving effect to Johnson's opinion, the question was submitted to Crittenden, the new Attorney General, who, on the 30th of June, 1851, gave his opinion that the grant did not extend above the Raccoon Forks. A. H. H. Stuart, Secretary of the Interior, on the 26th of July, 1851, concurred in this opinion, but on the 29th of October, 1851, addressed a letter to the Commissioner of the General Land Office, directing him to select and report for his approval a list of the alternate sections of land claimed by the State of Iowa above the Raccoon Forks, assigning as a reason therefor that by approving the selections without prejudice the question would be left open to the construction of the judiciary, and that the questions involved were more of a judicial than an executive character, and that the question must ultimately be settled by the judiciary.

In the following May three lists of lands were prepared in the General Land Office, headed as follows:
108 "No. 1. Showing the tracts falling within the limits of the Des Moines grant above the Raccoon Forks, so far as the surveys have extended, under the decision of the Secretary of the Treasury, March 2, 1849, that such grant extended to the northern boundary of the State.

"No. 2. Showing tracts disposed of within these limits between the date of one of the orders limiting the grant and one extending it.

"No. 3. Showing the vacant lands subject to the claim of the State."

The Secretary of the Interior, on the 30th of October, 1851, approved of this last list in accordance with his view of October 29th.

On the 30th of October, 1851	214,391.58	acres.
" 10th of March, 1852	143,908.37	"
" 17th of December, 1853	33,142.43	"
" 30th of December, 1853	12,812.51	"

were thus certified and approved by the Secretary of the Interior. These approvals were certified under the reservations above referred to in the letter of October 29th, 1851.

The 12,812.51 acres above referred to were selected under the act of September 4, 1841, giving to each of the new States 500,000 acres of land on coming into the Union.

On the 21st of March, 1856, the Commissioner of the General Land Office decided that the grant did not extend above the Raccoon Forks. The question was brought anew before the Secretary of the Interior, and he referred it to the Attorney General, who advised a proposal of settlement. This was not accepted by the State of Iowa. On the 7th of May, 1858, the Secretary of the Interior rejected the claim of the State. An appeal was taken to the President, who referred the question to Attorney General Black, who decided in a letter dated November 22, 1858, that the claim of the State did not extend north of the Raccoon Forks.

109 In December, 1859, the Supreme Court of the United States, in suit between E. C. Litchfield *vs.* The Dubuque & Pacific Railroad Company—Litchfield claiming under the act of 1846—held that the grant did not extend north of the forks of the Raccoon, and that the acts of Stuart and McClelland, Secretaries of the Interior, in reserving and setting apart the lands north of the Raccoon Forks, were null and void, and by that decision carried out the suggestion of the Secretary of the Interior that the question was a judicial one, and must be settled by the courts.

3. On the 15th of May, 1856, Congress passed an act making a grant of land to the State of Iowa in alternate sections to aid in the construction of certain railroads in said State. By section one, among other roads, a grant of land was made of alternate sections, designated by odd numbers, of six sections of land in width on each side of a railroad from Dubuque to a point on the Missouri at or near Sioux City; and if, when the line of said road was definitely fixed, the United States had sold any of said sections, then the State was authorized, subject to the approval of the Secretary of the Interior, from other alternate sections within fifteen miles of the line of the road to make up the quantity. Said section provided that the lands so granted should be applied exclusively to the construction of the road, and excluded from the grant all lands before reserved by act of Congress, or any other manner by competent authority, for the purpose of aiding in works of internal improvement or any other purpose whatever. Congress had, prior to this, in 1850, made a grant to the State of certain

swamp lands, which might and did, upon survey and location, include a part of the lands otherwise included in the railroad grant of 1856.

On the 14th of July, 1856, the State of Iowa, by legislative act, accepted the grants made by act of Congress of May 15, 1856, and parcelled out the lands to the various railroad companies therein referred to, and by the fifth section of said act so much of the
110 lands, interests, rights, powers, and privileges as are or may be granted and conferred under said act of Congress to aid in the construction of the railroad from Dubuque to Sioux City was granted and conferred by the State to the Dubuque & Pacific Railroad Company, a body corporate created by and existing under the laws of Iowa. The act of Congress of May 15, 1856, authorized the State to dispose of the lands in this way, and a quantity of land not exceeding one hundred and twenty sections for every twenty miles of road built was to be conveyed to the company, and whenever the Governor of the State should certify to the Secretary of the Interior that any continuous twenty miles of road was completed then a hundred and twenty sections of land next nearest that was to be sold and conveyed to the said railroad corporation, and so on from time to time until the road is completed, and if any of the road was not completed in ten days no further conveyance was to be made and the lands unsold were to revert to the United States. The Iowa act of July 14, 1856, required the Dubuque & Pacific Railroad Company to comply with these terms. The said Dubuque & Pacific Railroad Company accepted the terms of said act. The most of the road was surveyed by the 18th of April, 1857. A plat of the same was by that day presented by the Governor of Iowa to the Secretary of the Interior, and the alternate sections on the line thereof designated and set apart by him to the State of Iowa under the terms of the grant of the 15th of May, 1856. The line of this road crossed the Des Moines in an east and west direction, above the Raccoon Forks, and though a claim had been made and even land certified under the act of August 8, 1846, yet, after the decision referred to by the Secretary of the Interior, the State of Iowa asked and the Secretary of the Interior reserved the lands within the five miles of the Des Moines river above the Raccoon Forks for the railroad instead of the river grant, and said lands were reserved by proclamation of the President immediately after passage of the act, 1856.

The said Dubuque & Pacific Railroad Company, immediately after the location of said railroad and the selection and setting apart
111 of the lands granted under said act, proceeded to build their road. The said railroad company performed all the conditions of said act up to the first day of June, 1861. In the month of August, 1861, the Dubuque & Pacific Railroad Company was merged in a new company, called the Dubuque & Sioux City Railroad Company, a corporation duly created under the laws of the State of Iowa, and which succeeded to all the rights and obligations of the Dubuque & Pacific Railroad Company. On the first of January, 1861, the Dubuque & Pacific or the Dubuque & Sioux City Railroad Company had built

and equipped five sections of twenty miles each, making one hundred miles of continuous railroad, and by the terms of the grant from Congress and the Iowa Legislature had acquired a complete and perfect title to the lands afterwards conveyed by the Dubuque & Sioux City Railroad Company to the plaintiff's assignors. The Governor of Iowa in March, 1860, certified that the four sections of twenty miles each of said railroad from Dubuque to Sioux City were completed according to the act of Congress of the 15th of May, 1856. On the 25th of April, 1861, the Governor of Iowa certified that the Dubuque & Sioux City Railroad Company had completed the fifth continuous twenty miles from Dubuque west, making one hundred miles, and, on the 29th of July, 1865, the Governor of Iowa certified that said company, on the 2d of June, 1864, had completed the sixth section of twenty miles of said road west from Dubuque.

By the completion of said first five sections of twenty miles the said Dubuque & Sioux City Railroad Company, on the 21st of April, 1861, became entitled to the lands on both sides of the Des Moines river conveyed to and now held by the plaintiffs.

During the progress of the controversy between the State and Federal officers in relation to the construction of the act of 1846 selections of land which might belong to the State were made and approved as above stated, but not otherwise. After the
112 opinion of Attorney General Black, in 1858, the State of Iowa and the Secretary of the Interior treated the lands in Iowa as belonging to the railway (not river) grant, and on application of the Des Moines Navigation Company for a title, as assignee of the State, was refused by the Secretary of the Interior in 1860 and 1863.

On the 11th of April, 1863, the Commissioner of the General Land Office certified, and the Secretary of the Interior approved the selections, that the Dubuque & Sioux City Railroad Company was entitled to the lands now claimed by the plaintiffs, as purchasers of the Dubuque & Sioux City Railroad Company, and the said railroad company acquired title to the same when the certificate was given by the Governor, in 1861, that they had completed the fifth section of twenty miles of their road.

The State of Iowa, under the river grant of the 8th of August, 1846, undertook to improve the navigation of the river, and, up to the 9th of June, 1855, had sold about 327,000 acres of land, of which amount 58,830 acres were located above the Raccoon Forks. On the 9th of June, 1854, the State made a contract with the Des Moines Navigation & Railroad Company, a corporation created by the laws of Iowa, to improve the navigation of the river, and to convey to said corporation all the remaining lands belonging to the State under the act of 1846. This corporation made some progress in their work, and, as the improvements progressed, the State, by its proper officers, issued to the company certificates of land, the first dated the 14th day of May, 1855, for 88,853.10 acres; the second, May 6, 1856, for 116,636.54 acres, making in all 305,489.64, all located above the Raccoon Forks except about 50,000 acres, and

including the lands owned or claimed by the plaintiffs east of the Des Moines river.

The Commissioner of the General Land Office and the Sec-
113 retary of the Interior refused to certify or convey these lands to the State or the Des Moines Navigation & Railroad Company, their last act being to set apart the lands on the 30th of December, 1853; and, there being no other provision made for payment to the Des Moines Navigation & Railroad Company, the State and the said company, in pursuance of joint resolutions of the Legislature of March 22, 1858, settled the difficulties arising out of the construction of the grant of August 8, 1846, whereby the State relinquished its title to the land certified by the State officers to the company, to wit, 205,489.64 acres. The company paid the State twenty thousand dollars, and abandoned the work.

The State, on the same day (March 22, 1858), by legislative act, conveyed its remaining interest in the lands to the Keokuk, Fort Des Moines & Minnesota Railroad Company, now called the Des Moines Valley Railroad Company, a corporation created by the laws of Iowa, subject to the grants made by the State to the railroad companies under the acts of May 15 and July 14, 1856.

On the 2d of March, 1861, Congress, by a joint resolution, held that the grant of August 8, 1846, did not extend above the Raccoon Forks, and released to the State of Iowa certain lands above the forks which had been improperly certified to the State by the Secretary of the Interior, and were then held by *bona fide* purchasers from the State. This joint resolution was construed by the State and Congress, through its executive officers, to refer to certain lands above the forks, conveyed to settlers or other individuals, amounting to about 58,000 acres, a list of which is herein referred to, and includes no part of the lands claimed by the plaintiffs. At the date of this resolution the Dubuque & Sioux City Railroad Company had acquired from the State, with the assent of the Secretary of the Interior, the title to the lands now claimed by the plaintiff in this controversy. The certificates therefor had then all been issued by the Governor of the State.

114 On the 12th of July, 1862, Congress passed an act whereby the grant of lands to the Territory of Iowa by act of Congress of August 8, 1846, was extended so as to include the alternate sections of land lying within five miles of the Des Moines river, above the Raccoon Forks, to the northern boundary of the State. Said act and resolution of the 2d of March, 1861, was passed at the request of the Legislature of Iowa, with an express reservation of all rights to the grantors of the plaintiff. The resolutions of the Legislature are hereto annexed. Said act provided that if any of the lands had been sold or otherwise disposed of by the United States before the passage thereof, except those released by the resolution of March 2, 1861, (1862 miscalled in the act) the Secretary of the Interior was directed to set apart an equal amount of lands lying within the State, to be certified in lieu thereof, and if the State had sold any part of the lands lying within the limits of the grant, the title of which had proved invalid, and any land which should be certified to the State

in lieu thereof, by the provisions of said act, should be held as a trust fund for the benefit of the persons whose title had failed.

At the date of this act the Supreme Court, in the case of Litchfield *v.* Dubuque & Pacific Railroad Company, 2 Black, 66, had decided that the grant of 1846 did not extend above the Raccoon Forks, and that the title of the Des Moines Navigation & Railroad Company to such lands as had been certified and conveyed to them above the Raccoon Forks had failed. This decision was made at the December term of the court, in 1859. The court in said cause held that the setting apart of these lands by Stuart, Secretary of the Interior, was a null and void act, and implied that the railroad company was entitled to the lands in dispute under the act of 1856. Under the act of July 12, 1862, the State of Iowa, through its officers, and the Secretary of the Interior treated the title of the Dubuque & Sioux City railroad, under the act of 1856, as a good title. The State of Iowa passed resolutions appointing Josiah A. Harvey, register of the State land office, a commissioner to adjust with the
115 General Government the claims of the State under the act of July 12, 1862, and, on the 22d of May, 1866, the said commissioner and the State of Iowa did adjust and settle the claim of the State under the resolution of March 2, 1861, and act of July 12, 1862, by a paper-writing, which was approved by the State of Iowa on the 20th of June, 1866. Both the Secretary of the Interior and the State of Iowa, in said settlement, treated the lands claimed by the plaintiff as having been sold or disposed of by the United States, under the act of 1856, to the Dubuque & Sioux City Railroad Company, and the Secretary of the Interior set apart an equal amount of lands in lieu thereof, which were held by the State in trust for the parties whose title had proved invalid, which title so proved invalid *were* — the Des Moines Navigation & Railroad Company.

The lands referred to in the resolutions of March 2, 1861, were settled by the State and the Secretary of the Interior, and were entirely different lands from these claimed by the Des Moines Navigation Company. The settlement of 1866 contained the following distribution of lands:

"*Adjustment of Iowa Des Moines River Grant under Act of July* 12, 1862, *and Joint Resolution of March* 2, 1861.

"DEBIT.

	Acres.
"The State of Iowa, the quantity of indemnity lands selected under special certificate dated April 25, 1863	297,603.74
"The lands in place (meaning by 'in place' the odd sections not sold by Congress within limits of grant)	167,109.02
"The lands in place confirmed by joint resolution March 2, 1861	44,838.64
"The quantity selected on the east fork Des Moines river, and certified to the State under original act of Aug. 8, 1846	11,661.80

"The excess selected and approved to State under its 500,000-acre grant ---------- 35,473.54

"556,686.74

"Remains due State ---------- 1,317.32

"558,004.06

"CREDIT.

"Whole area of grant above Raccoon Forks ---------- 558,004.06"

116 By the act of the 12th of July, 1862, and said settlement the State of Iowa became the trustees of the Des Moines Navigation and Railroad Company and its assigns for so much of said lands above the forks as the State had conveyed to them, a part of which (about fifty thousand), east of the Des Moines, was conveyed by the Secretary of the Interior and the State to the Dubuque & Sioux City Railroad Company; and if the latter company's title failed, and the Des Moines Navigation Company's title was good, then a trustee for the plaintiffs in this suit.

As to these lands claimed by the plaintiffs west of the Des Moines river the navigation company has never claimed them. The Des Moines Valley Railroad Company has disclaimed any title as to part of them and claims title as to part. If they now assert any they have none, they having received from the State indemnity lands in lieu thereof, which is in law a complete bar to their claim. Plaintiff prays that they may disclose what part they claim, if any.

The State of Iowa has recently conveyed by quit-claim all its title to the indemnity lands under the act of July 12, 1862, but as to such of said lands as were held in trust by the State for parties whose title had failed the conveyance by quit-claim does not pass the title held in trust; and if it did the Des Moines Valley Railroad Company holds them also in trust, and for no other purpose.

The said Des Moines Valley Railroad Company have executed a deed of trust to M. D. Gilman and N. A. Crowdey of all such lands as they had or might obtain from the State for building their road, and no others.

After the passage of the act of July 12, 1862, and the acceptance thereof by the State of Iowa, and the settlements of May, 1866, Samuel G. Wolcott, a citizen of New York, claiming to be a purchaser of the east half of sec. 17, T. 87 N., R. 27 west, in the county of Webster, Iowa, from the Des Moines Navigation Company, by
117 deed of date of August 1, 1859, brought a suit in the circuit court of the United States for the southern district of New York against the Des Moines Navigation and Railroad Company for a breach of warranty of title. This suit was brought by Wolcott in New York, by consent of the Des Moines Navigation Company, outside of the jurisdiction of the State of Iowa, by the laws of which it was created, and where alone it could reside and be sued on such a contract, and was designed and intended by the parties to make an agreed case to settle the construction of an act of Congress, in which bill the plaintiff and defendant had the same interest, averse to the claim of the

plaintiffs in this suit, in which they jointly paid the costs, and the attorneys employed were both really interested on the same side, and their object was to obtain an adjudication of the rights of the plaintiff and others who were like situated and were not before the court. Though the suit was commenced before the settlement under the act of July 12, 1866, it was not decided in the Supreme Court until after the settlement under that act. The rights of the plaintiff, as herein declared, were not set forth in the pleadings or alluded to by the court. The settlement of 1866 and the construction of the act of 1862 by the State and Federal Government were not known to the court, and the decision in that case is no bar nor precedent to control the action of this court on the question now presented. The decision of the Supreme Court in that cause, holding the Des Moines Navigation Company's title good, was made at the December term of the Supreme Court for 1866.

After the settlement of the State with the Des Moines Navigation Company, in 1858, the said navigation company conveyed certain parcels of the lands now claimed by the plaintiff to the following persons, among others: Samuel G. Wolcott, Wm. B. Welles, Roswell Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, and John Stryker. These parties, and others not known to the plaintiffs, have commenced a very
118 large number of actions at law in this court, the plaintiff is informed, to the number of one hundred and fifty, against persons claiming both from the plaintiffs or otherwise to eject them from lands owned by the plaintiffs. A great many more actions at law have been commenced against other parties involving the same title; and actions at law are threatened to be brought directly against the plaintiff for the lands in dispute, which they have not contracted to sell, and of which they are in nominal possession, on which they pay taxes. A list of some of these suits and the names of the parties and description of the lands claimed are hereto annexed and made part of this bill. The Des Moines Navigation Company have also begun suits at law against claimants under the plaintiffs, or for the plaintiff's lands, which will appear by said list. These purchasers from the navigation company are said to be, and the plaintiff so charges were, stockholders in the corporation, and held the title to the lands claimed by them for their share, or parts of it, of stock in the corporation. Neither the navigation company nor the stockholders thereof were purchasers without notice. They knew the construction put on the act of Congress before they made their contract with the State, and they knew of the passage of the act of 1856 and its construction before they made the settlement and received the conveyance from the State.

The Secretary of the Interior, O. H. Browning, at one time construed the decision in Wolcott's case to entitle the United States to all the lands claimed by the plaintiff, because the State had got other lands in lieu thereof—one on the act of July 12, 1862—and he has allowed parties to apply for pre-emption to the lands claimed by the plaintiff. He has reversed this decision in part, but the parties

named as pre-emptors still claim title to the property adversely to the plaintiffs. A list of said applicants is hereto annexed and made part hereof.

The Des Moines Valley Railroad Company, formerly the Keo-
119 kuk, Fort Des Moines & Minnesota Railroad Company, have obtained a quit-claim deed for and claim title to, not only all the lands certified to the State of Iowa under the settlement of 1866, between the State and Federal Governments, which were set apart to them within the limits of the grant, called lands in place, but they claim title to all the lands certified to the State in trust for these parties to whom the State had conveyed title and which had failed. The State of Iowa has accepted the trust, and any persons claiming to hold any of the trust lands hold them subject to the trust. There has been no separation of these held in trust, for the bad title, from the others.

The plaintiffs allege that theirs is the better title to the lands claimed by them. A list of those conveyed to the Dubuque & Sioux City Railroad Company, within the limits of the Des Moines river grant, on each side of the river, is made out in separate tracts and made part of this bill. Copies of the plaintiff's title deeds and certificates are also annexed and made part of this bill. The plaintiff also attaches to this bill and makes part thereof a list of the suits at law begun as herein set forth in part; certificates of the Governor of Iowa and the Secretary of the Interior conveying title to the Dubuque & Sioux City Railroad Company; copies of the settlement of the State of Iowa and the United States under the resolutions of March 2, 1861, and July 12, 1862; copies of the acts of Congress and Legislature of Iowa which relate to the controversy; copies of the correspondence of various public officials which relate to the subject, and makes them all a part of this bill.

The plaintiffs allege that the title claimed by the Des Moines Navigation Company and their vendees, Walcott, Welles, Burrows, Edwin C. Litchfield, William J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, and John Stryker, is the inferior title, and one which the State had conveyed away and failed, and referred to in the act of July 12,
1862; that the Des Moines Valley Railroad Company have no
120 title to either the lands claimed by the plaintiff or to the lands conveyed to the State in trust for the party whose title had failed; and, if they have any legal title to such, they held it in trust for the navigation company and their assignees or for the plaintiff. If the plaintiff's title is the one that has failed and referred to in the act of July 12, 1862, then the State is the trustee of the plaintiff. The Des Moines Valley Railroad Company held the residue undivided, and are bound to surrender all claim derived from the State by their deed to the plaintiff, and are bound to consent to a severance of the lands belonging to the plaintiff in such case from the residue. Thomas Colter, Jacob Crouse, and John P. McDermott have no right to the pre-emptions claimed by them.

The said plaintiffs have been in possession of the lands claimed by them, themselves or their vendees in contract, since 1861. They

have paid the taxes thereon to the State of Iowa since, in all amounting to eighty thousand dollars, and if their title has failed they are entitled to have their taxes refunded since 1861 by the holder of the legal title, who has not paid them.

The plaintiff says he has no adequate remedy for the grievances complained of, except in a court of equity. He makes The Des Moines Navigation and Railroad Company, Samuel G. Wolcott, Wm. B. Welles, Roswell Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, and John Stryker, The Des Moines Valley Railroad Company, and Thomas Colter, Jacob Crouse, John P. McDermott, parties defendant to this suit, and prays for a writ of subpœna against them, returnable to the next term.

The plaintiff prays that said parties may be enjoined from prosecuting said actions or any other actions at law in relation to the title or possession of any of said lands until the final hearing of the bill; that the injunction be made perpetual; that said defendants, Colter, Crouse,
and McDermott, be enjoined perpetually from prosecuting any
121 pre-emption to any of said lands; that the conflicting acts of the Secretary of the Interior and judicial decisions may be finally interpreted; that the plaintiffs may be quieted in their title and possession to said lands on both sides of the river; or, if the plaintiff's title to said lands is not the better title, and his title to said lands is the title conveyed by the State, and failed under the right interpretation of the acts of 1846, 1856, and 1862, that his title to an equal number of acres in lieu thereof be decreed and established; that an account be taken of said indemnity lands, and the Des Moines Valley Railroad Company be decreed to make partition thereof, and set apart and convey or relinquish to the plaintiff such lands as the plaintiff may be entitled to under said act of July 12, 1862 (the State being acting trustee to do justice in the premises, and to convey to such party as may be established the true beneficiaries under said act); that in the event of a decree that the plaintiff's present title or any part of it has failed that the said Des Moines Navigation and Railroad Company and its assigns may be decreed to repay to the plaintiff all taxes which he has paid on said lands, and interest thereon.

And that said Des Moines Valley Railroad Company be decreed to release to the plaintiff all claim to the indemnity lands set apart to the plaintiffs, and for such other relief as the nature of the plaintiff's case may require.

GRANT & SMITH,
Attorneys for Plaintiff.

The defendant read from the same record the answer of William B. Welles, one of the defendants in said suit, as follows:

122 United States Circuit Court, District of Iowa. In Equity.

THE IOWA HOMESTEAD COMPANY, Complainant,

vs.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. Wolcott, Wm. B. Welles, Roswell Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John Stryker, & Others, Defendants.

The several answers of the defendant, Wm. B. Welles, to the bill of complaint of the Iowa Homestead Company, complainant.

This defendant, Wm. B. Welles, now and at all times hereafter, saving and reserving to himself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereto, or unto so much or such parts thereof as this defendant is advised is material for him to make answer unto, answers and says that he is informed by complainant's said bill of complaint, and believes to be true, that the said Iowa Homestead Company is a corporation created by the laws and a citizen of the State of Iowa, for the purpose of buying and selling lands in said State, but as to whether or not said corporation was duly created and organized by a full and complete observance of the requirements of the statutes of said State authorizing and providing for the organization and formation of corporations this defendant has not sufficient knowledge or information to form a belief.

And this defendant says that, as to whether or not said complainant, by deed of purchase bearing date November 12, 1863,
123 acquired by and through the Dubuque & Sioux City Railroad Company all the rights of the said company and the Dubuque & Pacific Railroad Company to about fifty thousand acres of land lying on the east side of the Des Moines river, in Webster and Humboldt counties, Iowa, being the odd sections of land within the limits of the Dubuque and Pacific railroad grant of 1856, and of the Des Moines river grant of 1846, as in complainant's bill alleged, the defendant is ignorant and uninformed save by complainant's bill of complaint, and leaves complainant to proof thereof; but he expressly denies that by such deed or deeds of purchase or otherwise the said complainant ever acquired the right and title of the State of Iowa to the said fifty thousand acres, as in complainant's bill claimed.

And this defendant, further answering, admits that the said Des Moines Navigation & Railroad Company is a corporation created by the laws of the State of Iowa, and the said company and its grantees claim the said fifty thousand acres of land — in the said bill of complaint, and the lists therein referred to and thereto annexed and described, or so much and such parts and portions thereof as were certified and approved to the State of Iowa, under the act of August 8, 1846, and conveyed to the said Des Moines Navigation & Rail-

road Company by the State of Iowa and subsequently confirmed by the joint resolution of March 2, 1861, and the act of Congress of July 12, 1862, as hereinafter stated and set forth; and this defendant alleges and avers that the said Des Moines Navigation & Railroad Company and its grantees claim all the lands lying in the alternate odd-numbered sections within five miles of the Des Moines river, and on the east side thereof, and in the said counties of Webster and Hamilton and Humboldt, as far north as the north line of township 92, and on the west side thereof as far north as the second correction line, and have full and complete title thereto, as hereinafter stated and set forth.

. And this defendant admits the passage by Congress of the
124 said act of August 8, 1846; that on the 24th of February, 1847, the State of Iowa appointed a board of public works to improve the navigation of said (Des Moines) river, and that on the 23d day of February, 1848, R. M. Young, Commissioner of the General Land Office, addressed to the secretary of the said board of public works a letter containing the language quoted in complainant's bill stated and set out.

And this defendant admits that on or about the 17th of October, 1846, the Governor of the State of Iowa was notified by James H. Piper, acting Commissioner of the General Land Office, by letter, that, "under the grant of August 8, 1846, the Territory of Iowa was entitled to the vacant lands in the alternate sections within five miles on each side of the Des Moines river from the northern boundary of Missouri to the Raccoon Forks of the Des Moines river," but, upon information and belief, he denies that the territorial and State authorities acquiesced in the opinion expressed in said letter, so far as it implies that the grant extended only to the Raccoon Forks.

And this defendant admits that on the 19th of June, 1848, the President, by proclamation, ordered into market some of the lands in the odd-numbered sections above the Raccoon Forks; that the board of public works in Iowa protested against this; that, on the 8th of January, 1849, the delegation in Congress from Iowa called the attention of the Secretary of the Treasury to the construction of the act of August —, 1846, claiming that the odd sections above the Raccoon Forks, which had been ordered into market by the President, belonged to the State of Iowa, under the said grant of August 8, 1846, and that R. J. Walker, Secretary of the Treasury, on the 2d day of March, 1849, held and decided that the said grant of August 8, 1846, extended to the source of the Des Moines river.

And this defendant admits and alleges that on the 2d of March,
1849, R. J. Walker, Secretary of the Treasury, communicated to
125 R. M. Young, Commissioner of the General Land Office, his said decision in respect to the extent of said grant, and instructed him to be governed thereby, and that on the 16th of June, 1849, the said Commissioner withdrew the said lands in the said odd-numbered sections above the Raccoon Forks from sale, pursuant and in obedience to the said construction of Secretary Walker, and on the same day the said Commissioner advised the land officers in the State of Iowa having in charge the sale of public lands above the Raccoon

Forks in the State of Iowa of the decision of the Secretary of the Treasury, and directed and instructed them accordingly to withdraw from market and withhold from sale the lands in the odd-numbered sections above the Raccoon Forks and within five miles of the Des Moines river.

And this defendant, further answering, admits that on or about the 14th of January, 1850, the Commissioner of the General Land Office informed Ewing, Secretary of the Interior, that the lands charged against the State of Iowa amounted to 825,078 acres, and when the grant was adjusted the amount between the Raccoon Forks and the source of the river was estimated to contain 900,000 acres.

And this defendant, further answering, says that as to whether or not the Commissioner of the General Land Office on the 13th of March, 1850, submitted to Secretary Ewing three lists of lands showing the tracts falling within the limits of the grant above the Raccoon Forks, as in complainant's bill alleged, he is ignorant and -informed, save by the complainant's bill of complaint; he admits, upon information and belief, that on the 6th of April, 1850, Secretary Ewing addressed to the Commissioner of the General Land Office the letter of which a copy, in substance, is set out among the exhibits annexed to complainant's printed bill, at pages 64 and 65 thereof, but he denies that said Ewing, by said letter or otherwise, revoked the decision of Secretary Walker, and denies that he had any authority to review or reverse the decision of Secretary Walker, which had been acted on and carried out, and that his said letter or any
126 act or order of his whatever could affect or reverse the said decision of Secretary Walker.

And this defendant, further answering, admits that on the 19th of July, 1850, Reverdy Johnson, Attorney General, upon submission of the question to him by the President, gave and rendered his opinion that the grant of August 8, 1846, extended above the Raccoon Forks, to the source of the river; that on the 30th of June, 1851, Crittenden, Attorney General, expressed the opinion that the grant did not extend above the Raccoon Forks; that on the 29th of October, 1851, Stuart, Secretary of the Interior, addressed to the Commissioner of the General Land Office the letter, of which a copy is set out among the exhibits annexed to complainant's printed bill on file, on pages 65 and 66, in which he directed said Commissioner to select and report for his approval a list of the alternate sections of land claimed by the State of Iowa above the Raccoon Forks, under the said grant of August 8, 1846, and this defendant alleges and avers that said Secretary Stuart, by his order and direction in said letter contained, expressly and distinctly recognizes the acts of Secretary Walker in the premises as valid and binding upon the United States, and directly recognizes the validity of the claim of the State of Iowa under the said grant of August 8, 1846, to lands lying in the alternate odd-numbered sections above the Raccoon Forks, and within five miles of the Des Moines river, including those claimed by the complainant in this action as against

the said Des Moines Navigation and Railroad Company and its grantees.

And this defendant, further answering, admits that the Supreme Court of the United States, at the December term, 1859, and on or about the 9th day of April, 1860, in the case of Litchfield *vs.* The Dubuque & Pacific Railroad Company, held and decided that the grant contemplated by the act of August 8, 1846, did not extend above the Raccoon Forks.

127 And this defendant, further answering, admits and alleges that on the 30th of October, 1851, the Commissioner of the General Land Office and the Secretary of the Interior certified and approved to the State of Iowa, under the said grant of August 8, 1846, of the lands lying in the alternate odd-numbered sections above the Raccoon Forks, 214,391.58 acres, and on the 10th of March, 1852, the further quantity of 143,908.37 acres; and on the 17th of December, 1853, the further quantity of 38,142.43 acres; and on the 30th of December, 1853, the further quantity of 12,813.51 acres.

And this defendant, further answering, says that he is ignorant and uninformed, save by the said complainant's said bill of complaint, as to whether or not the Commissioner of the General Land Office on the 21st of March, 1856, decided that the grant of August 8, 1846, did not extend above the Raccoon Forks. Upon information and belief he admits that Attorney General Black, in his letter of November 22, 1858, expressed the opinion that the grant of August 8, 1846, did not extend above the Raccoon Forks, but upon information and belief he denies that the Secretary of the Interior on the 7th of May, 1858, rejected the claim of the State of Iowa to the lands above the Raccoon Forks, which had been certified to the State as aforesaid.

And this defendant, further answering, admits that the Congress of the United States, on or about the 15th of May, 1856, passed and enacted the act entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," and that a copy thereof is set out as an exhibit to complainant's bill in the printed copy thereof on file, at pages 127, 128, and 129 thereof, and also admits that on or about the 14th of July, 1856, the General Assemby of the State of Iowa passed the act entitled "An act to accept the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled 'An act making a grant of lands

128 to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State,'" approved May 15, 1856, and that a copy of the said act of the General Assembly is substantially set out in complainant's printed bill at pages 129, 130, 131, 132, 133, and 134 thereof, but this defendant expressly denies that, under and by the said act of Congress and the said act of the General Assembly, or either of said acts, either the State of Iowa or the Dubuque & Pacific Railroad Company or the plaintiff obtained or acquired any title or interest in the lands claimed by the plaintiff in this action which had been previously certified and approved to the State of Iowa by the Commissioner of the General

Land Office or the Secretary of the Interior under the said act of Congress of August 8, 1846; and this defendant expressly alleges and avers that all the lands in complainant's bill of complaint designated, specified, and claimed by plaintiff which had, previous to the passage of said act of Congress of May 15, 1856, been certified to the State of Iowa under the said grant of August 8, 1846, as hereinafter stated (being the lands lying in the alternate odd-numbered sections within five miles of the Des Moines river), had been, and at the time of the passage of said act of May 15, 1856, were, expressly reserved to and by the United States by competent authority, and by the last proviso in section one of said act were expressly reserved from the operations and effect of the said act, and the same, being so reserved, never passed to the State of Iowa under the said act of May 15, 1856, and by the said act the State of Iowa acquired no title to the said land for the purpose of said act or otherwise, and the State of Iowa was not authorized by the said act of May 15, 1856, to dispose and certify, or to convey or authorize to be conveyed, to the said Dubuque & Pacific Railroad Company, or to any corporation or person whatsoever, the said lands in the said alternate odd-numbered sections embraced in the limits of the lands certified and approved to the State of Iowa under the said grant of August 8, 1846, or any part or parcel or portion thereof.

And this defendant, further answering, says that as to whether or not a plat of the Dubuque & Pacific Railroad Company
129 was, on the 18th of April, 1857, presented by the Governor of Iowa to the Secretary of the Interior and the alternate sections on the line thereof designated and set apart by him to the State of Iowa under the grant of May 15, 1856, this defendant is ignorant and uninformed, save by said complainant's bill of complaint, but, upon information and belief, he denies that the State of Iowa asked, and the Secretary of the Interior reserved, the lands (so far as the same had been certified to the State of Iowa under the grant of August 8, 1846) within five miles of the Des Moines river above the Raccoon Forks for the railroad instead of the river grant.

And this defendant, further answering, upon information and belief, alleges and avers that the said Dubuque & Pacific Railroad Company and the Dubuque and Sioux City Railroad Company, nor either of said companies, ever complied with and performed the conditions and requirements of the said act of the General Assembly of July 14, 1856, to entitle them to the lands in controversy in this suit thereunder, but utterly failed to complete and construct their road as and in the manner and at the time and times in said act specified; and this defendant expressly denies that by anything in the said act of Congress of May 15, 1856, and the act of the General Assembly of the State — of July 14, 1856, contained, or by anything done by said Dubuque & Pacific Railroad Company or the said Dubuque & Sioux City Railroad Company, or the Governor of Iowa or the Secretary of the Interior, as in complainant's bill alleged, the State of Iowa or the said railroad company ever acquired any title to or interest in the lands lying in the alternate odd-numbered sections within five miles of the Des Moines river, and certified to

the State of Iowa by the Secretary of the Interior, under the said grant of August 8, 1846, as hereinafter stated and set forth.

And this defendant denies that, after the opinion of Attorney General Black in 1858, the State of Iowa and the Secretary of the Interior treated the said lands certified to the State under
130 act of August 8, 1846, as belonging to the railway and not to the river grant, and, upon information and belief, he denies that an application of the Des Moines Navigation Company for a title as assignee of the State was refused by the Secretary of the Interior, as in complainant's bill alleged. And this defendant, further answering, says that he is informed and believes to be true, and therefore alleges and avers, that the said Des Moines Navigation and Railroad Company uniformly, after the said lands were certified to the State under the said act of August 8, 1846, and sold and conveyed to the said company by said contract of June 9, 1854, and by the deeds to said company as hereinafter stated, claimed and insisted that they had and held full, absolute, and complete title to said lands; that with the sole view of procuring evidence to said company directly of the title to said lands said company, by Reverdy Johnson, their attorney, about the year 1856, applied to the Secretary of the Interior to issue patents for said lands directly to said company, but said Secretary declined and refused to issue said patents for the reason that the United States had no title thereto, having by the certificates of said lands to the State under the act of August 8, 1846, parted with its title to the said lands.

And this defendant denies that on the 11th of April, 1863, the Commissioner of the General Land Office certified that the Dubuque and Sioux City Railroad Company were entitled to the lands now claimed by plaintiff as purchasers of the Dubuque and Sioux City Railroad Company; and denies that the said Dubuque and Sioux City Railroad Company acquired title to said lands when the certificate was given by the Governor in 1861, as in complainant's bill alleged; and the defendant, upon information and belief, alleges that the certificate given by the Commissioner of the General Land Office was given on or about February 26, 1863, a copy of which, in substance, is set out in complainant's bill as an exhibit at pages 24 and 25.

And this defendant, further answering, says that as to
131 whether or not the Dubuque and Pacific Railroad Company in August, 1861 (or at any other time), was merged in a new company called the Dubuque and Sioux City Railroad Company, and which succeeded to the rights and obligations of the Dubuque & Pacific Railroad Company, this defendant is ignorant and uninformed, save by the said complainant's said bill of complaint; and he expressly denies that — the completion of the said first five sections of twenty miles each the Dubuque and Sioux City Railroad Company on the 25th of April, 1861, or at any other time, became, or that the said company or its grantees now is, entitled to the lands on both sides of the Des Moines river, now claimed by complainant in this action; and that this defendant is ignorant and uninformed, save by complainant's said bill, as to whether or not the Governor

of Iowa on the 25th of April, 1861, certified that said Dubuque and Sioux City Railroad Company had completed the fifth continuous twenty miles of road west from Dubuque, and as to whether or not said Governor on the 29th day of July, 1865, certified that said company on the 2d of June, 1864, had completed the sixth section of twenty miles of said road west from Dubuque, as in complainant's bill alleged.

And this defendant, further answering, admits that on or about the 9th day of June, 1854, the State of Iowa made and entered into a contract with the Des Moines Navigation and Railroad Company for the improvement of the Des Moines river, and to convey to said company all the unsold lands above the Raccoon Forks which had been certified to the State under the said act of August 8, 1846; that the said company undertook and entered upon said work, and as the improvement progressed the State, by its proper officers, issued to said company certificates of sale of about 205,489.64 acres of said lands, including those claimed by the plaintiff, east of the Des Moines river; and this defendant expressly denies that the Commissioner of the General Land Office and the Secretary of the Interior refused to certify or convey the said lands to the State
132 or the Des Moines Navigation and Railroad Company, and alleges and avers that all said lands were duly certified and approved to the State under the act of August 8, 1846, by said Commissioner and Secretary prior to the date of said contract with the State, June 9, 1854.

And this defendant, further answering, denies that the State of Iowa and the said Des Moines Navigation & Railroad Company, in the settlement made under and in pursuance of the joint resolutions of March 22, 1858, settled difficulties arising out of the construction of the grant of August 8, 1846, and he alleges and avers that the State then claimed to own and have the title to all the unsold lands which had been certified to it under the grant of August 8, 1846, and the settlement by and between the State and said company, in pursuance of which the State conveyed the said lands to said company, was simply a settlement of the claims made by said company for monies expended and work done, and materials furnished by said company, under its contract and the other claims referred to in said joint resolutions herein stated and alleged.

And this defendant, further answering, admits the passage by Congress of the joint resolution of March 2, 1861, but he denies that the said joint resolution was construed by the State of Iowa and by Congress, through their executive officers or otherwise, to refer only to lands above the Raccoon Forks conveyed to settlers and other individuals, and not to include the lands claimed by plaintiff in this action, and he expressly denies that at the date of said resolution the Dubuque & Sioux City Railroad Company had acquired from the State the title to the lands now claimed by the plaintiff in controversy as against the Des Moines Navigation & Railroad Company and its grantees, or any part or portion thereof.

And this defendant, further answering, admits that, at the date of said act of July 12, 1862, in said complainant's bill mentioned, the

Supreme Court, in the case of Litchfield *vs.* The Dubuque & Pacific Railroad Company, had decided that the grant of August
133 8, 1846, did not extend above the Raccoon Forks, but he denies that such Court, by implication or directly, in said cause held or decided that the said Dubuque & Pacific Railroad Company was entitled to the lands in dispute herein under the act of 1856 or otherwise; but, on the contrary, he affirms and alleges that the said Supreme Court, in the case of Wolcott *vs.* The Des Moines Navigation & Railroad Company, expressly held and decided that the said railroad company acquired no title to or interest in the said lands whatever under the said act of May 15, 1856, and that the same, by the terms of the proviso and exception in said act contained, were expressly reserved from the operation of said act from the grant therein contained.

And this defendant, further answering, admits that the State of Iowa appointed Josiah A. Harvey, register of the State land office, a commissioner to adjust the claims of the State under the grant made to the State, and that the act appointing said Harvey such commissioner was passed and approved March 30, 1866; that said Harvey, as such commissioner, as this defendant is informed and believes to be true, assumed, on behalf of the State, to make adjustments of the several grants to the State, but whether such adjustment is truly and correctly set out in complainant's bill this defendant has no knowledge or information save that implied by the allegations in the said complainant's said bill of complaint, but this defendant expressly alleges and avers that such assumed and pretended adjustment was not made until long after the title to the lands in dispute had, by the joint resolution of March 2, 1861, and the act of July 12, 1861 (heretofore referred to), been confirmed to the State and its grantees, and not until the month of June, 1866; and he expressly alleges that at the time of such assumed or pretended adjustment the title to the lands in dispute had wholly and absolutely passed from the State of Iowa, and then vested —; that the deeds or patents executed by the State to said company, and by said company to its several grantees, as herein stated, covering the
134 lands in dispute as against this defendant, were then in full force, having never been judicially set aside, and were and are conclusive as against the State, and that neither the State of Iowa nor its agent, the said Harvey, nor the census board of the State, nor the General Land Office and Secretary of the Interior had any power, authority, or control over said lands in dispute, and that any adjustment made by them, or any of them, in respect to the said lands, did and could in no way operate to impair or affect or disturb the title of the Des Moines Navigation & Railroad Company and its grantees to the said lands, but that such adjustment, so far as said company and its grantees are concerned, was and is of no binding force or obligation whatever, but was wholly and entirely nugatory and void.

And the defendant, further answering, expressly denies that the lands referred to and covered by the resolution of March 2, 1861, were different lands from those claimed by the Des Moines Naviga-

tion & Railroad Company, and he avers and alleges that the lands in dispute herein, so far as conveyed to said company, are part and parcel of the lands in said joint resolution referred to as having "been certified to the State improperly by the Department of the Interior as a part of the grant by act of Congress approved August 8, 1846," and held by *bona fide* purchasers under the State of Iowa, and that the confirmation of the same to the State of Iowa by the joint resolution vested the title therein in the grantees of the State, the said Des Moines Navigation and Railroad Company and its grantees, absolutely and beyond all control of the State or the United States.

And in support of the proposition that the lands included in and covered by the joint resolution of March 2, 1861, were the same lands now claimed by the Des Moines Navigation and Railroad Company and its grantees, including those in dispute in this action, this defendant alleges and avers that the Commissioner of the General Land Office, on the 26th day of June, 1862, for the purpose of
135 enabling the Land Department at Washington to determine what part and portions of the said lands which had been "certified to the State" had, by the State, been conveyed to *bona fide* purchasers under the State, addressed to the Governor of Iowa an official letter requesting the Governor "to furnish his office with a list of the tracts referred to in said resolution and held by *bona fide* purchasers under the State of Iowa on the 2d of March, 1861, and to certify the same under his official seal, specifying in each case the date of sale, name of purchaser, consideration, and the date of the patent or deed or conveyance by the State;" and that copy of said letter is set out among the exhibits to complainant's bill, on page 105 of the printed bill of complaint, and to which letter this defendant prays leave to refer; that afterwards, in compliance with the request of said Commissioner, the Governor of Iowa did furnish to said Commissioner the lists called for by the letter of the said Commissioner, duly certified, which said lists so furnished and certified by the Governor are now on file in the office of the Commissioner of the General Land Office, and to which, for greater certainty, this defendant prays leave to refer, and that said lists covered and embraced and included all the lands now claimed by plaintiff in this action as against the said Des Moines Navigation and Railroad Company and its grantees.

And this defendant, further answering, admits that, after the passage of the act of July 12, 1862, Samuel G. Wolcott, a citizen of New York, claiming the east half of section 17, township 88 (instead of 87, as complainant's bill alleged), range 27 west, in the said county of Webster, under purchase from the said Des Moines Navigation & Railroad Company, brought suit in the circuit court of the United States for the southern district of New York against said company for a breach of warranty of title, and that in said action the title of the said Des Moines Navigation and Railroad Company was, by the Supreme Court of the United States, held good and valid; and this defendant, upon information and belief, denies that the said suit was designed and intended by the parties thereto as an agreed
136 case to settle the construction of an act of Congress, in which

bill the plaintiff and defendant had the same interest adversely to the claim of plaintiff in this suit, and also, upon such information and belief, denies that both parties jointly paid the costs, and that the attorneys employed were both really interested on the same side, and that the object was to obtain an adjudication of the rights of the plaintiff and others who were like situated, and who were not before the Court; and he expressly alleges and avers that said suit was commenced in good faith, and for the purpose indicated by the pleadings therein, and was conducted without collusion and without any fraud upon the rights of the plaintiff or others interested or claiming to be interested therein.

And this defendant, further answering, alleges and avers that after the commencement of said suit by said Wolcott against the said Des Moines Navigation & Railroad Company, and before the same was determined, and while the same was pending, the said Dubuque & Sioux City Railroad Company, under which the plaintiff herein claims title, applied to the court to intervene as a party interested in the controversy therein; that such application was granted and the said railroad company made a party defendant; that the said railroad company, the grantors of the plaintiff herein, as this defendant is informed and believes to be true, and therefore alleges and avers, made such application to be made party defendant, and was so made such party with the full knowledge and consent and at the desire and instance and request of the said Iowa Homestead Company, the complainant in this action, for the purpose of protecting the interest of said homestead company, as well as those of the said railroad company, in the premises; that, on application, time was given the said railroad company to prepare for the trial thereof; that the said railroad company, as such party, was fully heard and represented, and its claims to said lands and title thereto litigated by said company, and passed upon and decided by said Supreme Court adversely to the claims of said railroad
137 company; that in such action the said railroad company relied upon and argued the same title or claim to title as is now urged and relied upon by the plaintiff herein; that the decision of the said Court in said action is conclusive and decisive and *res adjudicata*, so far as the claims of plaintiff in this action is concerned, and this defendant avers and insists that the said action and the decision of the said court therein is a full and perfect and complete bar to the maintenance of this action by the plaintiff and decisive of the plaintiff's claim herein.

And this defendant, further answering, admits that after the settlement of the State with the Des Moines Navigation & Railroad Company, 1858, the said Des Moines Navigation & Railroad Company conveyed certain parcels of the land claimed by plaintiff to Samuel G. Wolcott, Wm. B. Welles, Roswell S. Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Electus B. Litchfield, Edward Wade, and John Stryker, but he denies that said company conveyed any portion of said lands to the defendants, Albert H. Tracy, Francis W. Tracy, and Harriet Tracy, and, upon information and belief, alleges that the said defendants, Albert H. Tracy,

Francis W. Tracy, and Harriet Tracy, hold and acquired their title to the lands claimed by them under and through Albert H. Tracy, the father of the defendants, Albert H. and Francis W., and the husband of the said Harriet Tracy, who was a grantee of said company; and this defendant alleges and avers that he, as well as the other grantees of the said Des Moines Navigation & Railroad Company, was and is a *bona fide* purchaser of the tracts respectively conveyed to them by the said Des Moines Navigation & Railroad Company under the State of Iowa, and he expressly denies the allegation in the complainant's said bill of complaint averring that he or either of the other defendants are not *bona fide* purchasers of the tracts claimed by them respectively.

And this defendant, further answering, denies that the defendants, who are purchasers from the Des Moines Navigation & Rail-
138 road Company, received or hold the title to the lands respectively claimed by them for their share or shares of stock in said corporation, as in complainant's bill alleged, and denies that he is, or that any of such defendants are, purchasers, with notice of complainant's alleged equities; and he expressly alleges and avers that the said Des Moines Navigation & Railroad Company was and is a *bona fide* purchaser of all the lands conveyed to it by the State of Iowa, as herein stated, including those in dispute in this action, for a good and valuable consideration, without notice; that said consideration is found and appears in the said contract between the State of Iowa and the said company under date of June 9, 1854, herein, and in complainant's bill referred to, and the work and labor performed and expenditures incurred by said company thereunder, and the further consideration set forth and appearing in the said joint resolution of March 22, 1858, and the settlement thereunder; that the said act of May 15, 1856, which complainant claims to be the source and foundation of his title, was not passed until nearly two years after the date of said contract between the State and said company; that prior to and at the time of the passage of the joint resolution of March 22, 1858, and the settlement thereunder, and the execution of deeds or patents of the said lands by the State to said company, as herein stated, neither the agents and officials of the United States or of the State, nor the Dubuque & Pacific Railroad Company, nor the Dubuque & Sioux City Railroad Company nor their grantees, had ever made or asserted any title whatever to any of the lands so sold and conveyed to the Des Moines Navigation and Railroad Company, as herein stated, but the same were then held and claimed by the State under the said grant of August 8, 1846, and not otherwise.

And this defendant, further answering, says that as to the allegations in said complainant's bill of complaint touching and relating to the claim and title of the Des Moines Valley Railroad Company to parts and portions of the lands claimed by said company
139 and by the plaintiff in this action (except so far as the same are conferred by the joint resolution of the General Assembly of the State of Iowa of March 22, 1858, and set forth as an exhibit to complainant's bill) this defendant is ignorant and uninformed,

save by the complainant's said bill of complaint, and as to those allegations he leaves complainant to make such proof as he shall be advised is material and necessary, and this defendant disclaims all title to or interest in such parts and portions of said lands.

And this defendant, further answering, says that he admits that the copies of instruments annexed as exhibits to the complainant's bill of complaint, so far as the same are pertinent and bear upon the controversy between the plaintiff and the Des Moines Navigation and Railroad Company and its grantees herein, are substantially copies of the originals of which they respectively purport to be copies.

And this defendant, further answering, denies that the title of the complainant to the lands claimed by these defendants and by the Des Moines Navigation and Railroad Company and its grantees is superior and paramount to that of the said company and its grantees, and he expressly denies that the plaintiff, by reason of the matters in said complainant's bill of complaint contained as against the said Des Moines Navigation and Railroad Company and its grantees, has any title whatever to the said lands claimed by said company and its several grantees respectively.

And this defendant, further answering, says that as to whether or not the said complainant and its vendees has been in possession of and paid taxes on the lands claimed by them since 1861 to the amount of $80,000 this defendant is ignorant and uninformed save by the said complainant's bill of complaint, but he expressly avers that the possession of the said land by the said complainant and its vendees since 1861 is and has been unauthorized and wrongful, and the said complainant should be required to account for the use
140 and rents and profits thereof to the proper owners, respectively, during the time they have been in such possession; and he also expressly alleges and avers that all taxes whatsoever paid by said complainant have been paid by complainant voluntarily, with a knowledge of all the facts, and that the complainant is not entitled to have the same or any part thereof refunded.

And this defendant, further answering, denies that the defendants in this action have commenced actions at law in this court against persons claiming title through plaintiff, or otherwise to eject them from lands owned by the plaintiff, but he admits and avers that the said defendants have commenced actions in the district *counties* of Webster and Hamilton, in their respective names, both at law and in equity, against persons in possession and persons claiming title to recover possession, or to quiet titles to the tracts of the said lands claimed by said defendants in said counties of Webster and Hamilton.

And this defendant, further answering, alleges and avers that on the 8th day of August, 1846, the Congress of the United States passed an act entitled "An act granting certain lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river, in said Territory;" that by the first section thereof there was granted to the said Territory the one equal moiety in alternate sections of the public lands (remaining unsold and not

otherwise disposed of, encumbered, or appropriated) in a strip five miles in width on each side of said river, to be selected within said Territory by an agent or agents to be appointed by the Governor thereof, subject to the approval of the Secretary of the Treasury of the United States; that by the fourth section of said act it was enacted and provided "that whenever the Territory of Iowa shall be admitted into the Union as a State the land hereby granted for the above purpose shall be and become the property of said State for the purpose contemplated in this act and no other, provided the Legislature of the State of Iowa shall accept the said grant for the
141 said purpose" (and to which said act for greater certainty this defendant refers); that subsequently, to wit, in December, 1846, the said Territory of Iowa was admitted into the Union as a State, and that after its admission as such the State of Iowa, by a joint resolution of the General Assembly thereof, passed and approved January 9, 1847, accepted the said grant for the purposes in said act mentioned and specified.

And this defendant further shows that pursuant to and in accordance with the provisions of the said act of August 8, 1846, the Governor of Iowa appointed agents, who selected under the said act the lands situated and lying in the alternate odd-numbered sections within the limits of the said grant for and in behalf of the State, and that such selections when made were duly reported to the Commissioner of the General Land Office, and were duly approved by him and by the Secretary of the Treasury of the United States; that such selections and approval were made in the year 1846, and after such approval, and on the 17th day of October, 1846, the Commissioner of the General Land Office instructed the register and receiver in Iowa, having charge and control over lands, to reserve from sale or entry of any kind all the unsold and unappropriated lands in the sections selected by the State of Iowa as aforesaid; that on the 23d day of February, 1848, the Commissioners of the General Land Office held and decided that, under the said grant in said act of August 8, 1846, contained, the State of Iowa was entitled to the alternate sections within five miles of the Des Moines river, throughout the whole extent of that river within the limits of Iowa, and that such decision is found and contained in the letter of Richard M. Young, Commissioner, a copy whereof is set out in the printed bill of complaint, at pages 56 and 57 thereof, and to which this defendant for greater certainty prays leave to refer.

And this defendant, further answering, alleges and avers that on the 2d day of March, 1849, the Secretary of the Treasury of the United States held and decided that the said grant in the said
142 act of August 8, 1846, contained, and thereby contemplated, "extended on both sides of the said river, from its source to its mouth, but not to lands on said river in the State of Missouri," as will appear more fully by the letter of R. J. Walker, Secretary of the Treasury, to A. C. Dodge and others, a copy of which is set out in the printed bill of complaint, on page 61 thereof, and to which this defendant for greater certainty prays leave to refer; that in pursuance and in accordance with the said decision of the Secretary

of the Treasury the said Commissioner of the General Land Office, on the 1st day of June, A. D. 1849, directed and instructed the said register and receiver of the public lands at Iowa City, in the State of Iowa, to withhold from sale all lands situated in the odd-numbered sections within five miles of that (Des Moines) river above the Raccoon Forks, as will more fully appear by the letters of R. J. Walker to R. M. Young, Commissioner, and R. M. Young, Commissioner, to register and receiver at Iowa City, copies of which are set out in the printed bill of complaint, on page 62 thereof, and to which for greater certainty this defendant prays leave to refer; that such direction and order of the Commissioner of the General Land Office was received by the register and receiver of the United States land office at Iowa City on the 16th day of June, 1849, and the said order was adopted and approved by the Secretary of the Treasury of the United States, the other officers of the United States, including the heads of departments having the charge and control of the public lands, and the same was continued, carried out, enforced, and acted upon by all succeeding Commissioners of the General Land Office, and by all succeeding Secretaries of the Treasury and of the Interior having charge and control of the public lands, until the said lands lying in such alternate odd-numbered sections were duly certified and approved to the State of Iowa under and for the purpose of said grant of August 8th, 1846, as more fully hereafter stated, as will more fully appear by refer-
143 ence to the original letters, orders, and decisions of said Commissioners and Secretaries referred to, and to which for greater certainty this defendant prays leave to refer.

And this defendant, further answering, alleges and avers that all of the said lands which had been surveyed, lying in the said alternate odd-numbered sections above the Raccoon Forks, were, by the Commissioner of the General Land Office and by the Secretary of the Interior, in October, 1851, March, 1852, December, 1853, and January, 1854, duly certified and approved to the State of Iowa as having passed to said State under the said act of August 8, 1846, by lists or schedules thereof duly certified and approved and delivered to the State of Iowa by the said Commissioner of the General Land Office, under and with the approval and endorsement of the Secretary of the Interior, as will more fully appear by the said certified lists, to which for greater certainty the defendant prays leave to refer.

And this defendant, further answering, alleges and avers that the said Commissioner and Secretary of the Interior were the officers by law authorized and charged with the duty of approving and certifying the said lands to the State under said grant, and that the lists or schedules so certified and approved to the State of Iowa under said grant embraced and included and covered the land claimed by the complainant in this action.

And this defendant further alleges that the said lists and the certificates and the approval thereof and of the lands therein described to the State by the said Commissioner and Secretary of the Interior, under the said grant of August 8, 1846, as aforesaid, have never been

revoked, recalled, cancelled, and annulled, but are still outstanding and operative and in full force, and have since been fully confirmed by the Congress of the United States by a joint resolution thereof approved March 2, 1861, and by an act thereof passed and approved July 12, 1862; that at the time the said certified lists or schedules were prepared by the Commissioner of the General Land Office the lands therein were duly marked and entered upon the books and
144 plats of the General Land Office as having been granted to the State of Iowa for the purpose of the improvement of the Des Moines river, under the said act of August 8, 1846, and the same, since the said order of the said Commissioner on the 1st day of June, 1849, as aforesaid, have always and continually been considered, held, and treated by the several Departments of the Government as withheld and reserved from grant, sale, private pre-emption, and homestead entry; that said lands, in fact, since the first of June, 1849, have been legally and continuously reserved by the United States by its duly constituted officers and departments, and the said order of reservation has never in any wise, form, or manner, been recalled, revoked, cancelled, or annulled; that at various times and dates since the said 1st day of June, 1849, the Commissioner of the General Land Office and the Secretary of the Interior, being thereunto by law duly authorized and empowered, have recognized and approved and affirmed and continued the said order of reservation, and the same is still in force; all which will more fully appear by the respective and several orders and letters and official papers and documents of said officers relating to the matter of such reservation, and to which for greater certainty this defendant prays leave to refer.

And this defendant, further answering, alleges and avers that subsequent to such reservation aforesaid, and after said lands were so certified and approved to the State of Iowa under the said grant of August 8, 1846, as aforesaid, and on or about the 9th day of June, 1854, the State of Iowa entered into a contract in writing with said defendant, The Des Moines Navigation & Railroad Company, for the sale, transfer, and conveyance of all of the said lands in said certified and approved lists and schedules contained and described (except such parts and portions thereof as the State had sold and disposed of prior to the 23rd day of December, 1853), and to which said contract, for greater certainty, this defendant prays leave to refer.

And this defendant further alleges that afterwards, for the
145 purposes of a settlement with the Des Moines Navigation & Railroad Company under the said contract aforesaid, the General Assembly of the State of Iowa, on the 22d day of March, 1858, passed and adopted the joint resolution entitled "Joint resolution containing proposition for a settlement with the Des Moines Navigation & Railroad Company," a copy whereof is set out in the printed bill of complaint, at pages 116, 117, 118, and 119, and to which, for greater certainty, this defendant prays leave to refer; that the said Des Moines Navigation & Railroad Company accepted the propositions for the settlement in the said joint resolution contained, in the man-

ner therein specified and provided, and duly performed and complied with all the terms and conditions imposed upon it in and by said resolution, and in consideration thereof and of the said contract, and the work done by said company thereunder, and in pursuance of said joint resolution and the settlement thereunder, the State of Iowa, on or about the 3d day of May, 1858, by its deeds or patents duly executed and authenticated and delivered, granted, sold, and conveyed to the said company in fee-simple all the said lands in said certified lists described which had not been sold by the State under the said grant of August 8, 1846 (excepting about twenty-five thousand acres lying immediately above the Raccoon Forks), including the lands lying in the said counties of Webster and Hamilton, and claimed by the complainant in this action, and as will more fully appear by reference to said patents or deeds, and to which this defendant prays leave to refer.

And this defendant, further answering, alleges and avers that the said patents or conveyances from the State were made, executed, and delivered by the proper officers under the said joint resolution and the authority of the State, and upon a good and valuable consideration, and that the said company thereby became and was and is a *bona fide* purchaser of the said lands under the State of Iowa; that subsequent to such conveyance to the said Des Moines Navigation & Railroad Company by the State of Iowa aforesaid the
146 said company, for a valuable and adequate consideration to it paid by this defendant, duly bargained, granted, sold, and conveyed to this defendant about eight thousand and five hundred acres of the said lands in Webster and Hamilton counties now claimed in this action by the complainant, as will more fully appear by reference to the said deed from said company to this defendant, and to which this defendant prays leave to refer, and that this defendant is a *bona fide* purchaser of said tracts so conveyed to him by said company under the State of Iowa.

And this defendant, further answering, alleges and avers that at the December term of the Supreme Court of the United States of the year 1859, and late in the spring of 1860, the said Court held and decided that the grant contained in and contemplated by said act of August 8, 1846, did not extend above the Raccoon Forks; that at the subsequent session of the Congress of the United States that body, for the purpose of protecting the purchasers under the State, including the Des Moines Navigation & Railroad Company and its grantees, and of carrying out and giving to said act of August 8, 1846, the construction and interpretation which had been given to said grant by the Commissioner of the General Land Office and the Secretary of the Treasury and the other officers as aforesaid, and confirming the title to the same in the State and its grantees under the act of August 8, 1846, and on the 2d day of March, 1861, passed and adopted the joint resolution entitled "Joint resolution to quiet titles in the State of Iowa," a copy whereof is set out in complainant's bill of complaint at page 120 thereof.

And this defendant, further answering, alleges and avers that for the purpose and with the design and intent of extending the said

grant of August 8, 1846, to the northern boundary of the State, and of confirming the same and the title to the State and its grantees thereunder, and for the further purpose of giving and adopting and carrying out the construction which had been placed upon and given to said act of August 8, 1846, by the said several officers and departments of the United States, and protecting the Des Moines Navigation & Railroad Company and the grantees of the State, on the 12th day of July, 1862, passed and enacted the act entitled "An act confirming a land claim in the State of Iowa, and for other purposes," a copy whereof is in substance set out in complainant's said bill of complaint, on page 126 thereof, and to which said act this defendant refers.

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And this defendant, further answering, expressly alleges and avers that, by the said act of August 8, 1846, the reservation thereunder as aforesaid, the acts of the several officers and departments of the United States and the State of Iowa aforesaid, the said contract of June 9, 1844, between the State and the said Des Moines Navigation & Railroad Company, the joint resolution of the General Assembly of the State of Iowa of March 22, 1858, and the settlement and conveyance by the State as aforesaid, the joint resolution of Congress of March 2, 1861, and the act of Congress of July 12, 1862, directly extending and confirming the grant of August 8, 1846, as aforesaid, and the other matters above set forth, the Des Moines Navigation & Railroad Company acquired and obtained the full, complete, and absolute title thereto, and are entitled to have, hold, possess, and enjoy the respective tracts covered by the respective deeds.

And this defendant, further answering, denies that under the said act of May 15, 1856, in said complainant's bill of complaint referred to, and the act of the General Assembly of the State of Iowa approved July 14, 1856, and also in complainant's said bill of complaint referred to, or either of said acts, the State of Iowa acquired any title as trustee or otherwise to the said lands in complainant's bill charged to be claimed by the Des Moines Navigation & Railroad Company and its grantees, and also in said bill claimed to be the property of complainant as against the Des Moines Navigation & Railroad Company; and this defendant expressly avers and insists that all of the said lands in the alternate odd-numbered sections within five miles of the Des Moines river and within the limits of the grant to the State for the use of the Dubuque & Pacific Railroad Company, as contemplated by said act of May 15, 1856, were expressly reserved, and never in anywise passed to the State under the said act, as trustee or otherwise, in any *matter* whatever; and he alleges and avers that the title to the said lands in such odd-numbered sections is now, and for a long time has been, by reason of matters in this answer stated and set forth, fully, completely, and absolutely vested in the said Des Moines Navigation & Railroad Company and its grantees, and that as against the claim of the said company and its grantees the said complainant has no title to or interest in the said lands whatsoever.

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And this defendant denies that the said complainant is entitled to the relief prayed in his bill of complaint herein or any part thereof.

And this defendant says that he denies each and every material allegation in complainant's bill of complaint contained not hereinbefore well and sufficiently answered, confessed and avoided, traversed or denied, except the allegations relating to the Des Moines Valley Railroad Company and the lands claimed by said company and in which this defendant claims no interest.

All of which matters and things this defendant is ready to aver, maintain, and prove as this honorable court may direct, and prays that, by reason of the said several matters aforesaid, the title of the defendant, The Des Moines Navigation & Railroad Company, to the lands herein claimed by said company be, by the decree of this court, confirmed and in all things held and declared valid and paramount, and that the respective titles of the other defendants named in this answer to the several tracts claimed by them, respectively, be also, by a decree of this court, confirmed and held and declared valid and paramount and absolute, and that these defend-
149 ants may have such other and further relief as is agreeable to equity and the practice of this court, and that they be hence dismissed with their costs herein most wrongfully sustained.

J. M. ELLWOOD,
Solicitor for Defendant.
D. O. FINCH, *Of Counsel.*

The following copies of the certificates under which the lands in controversy are claimed by the grantors of the Iowa Homestead Company were read in evidence by the defendant:

GENERAL LAND OFFICE, *Feb. 26th*, 1863.

I, J. M. Edmonds, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages one to four, inclusive, is a true and correct list of the tracts of land within the six-mile limits granted to the State of Iowa by the act of Congress approved the 15th day of May, 1856, entitled An act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of certain railroads in said State, being the vacant and unappropriated lands in the alternate sections designated by odd numbers for six sections in width on each side of the railroad "from the city of Dubuque to a point on the Missouri river near Sioux City, with a branch from the mouth of the Tete Des Morts to the nearest point on said road," known as the Dubuque & Sioux City (late Dubuque & Pacific) railroad, within the State of Iowa, and they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of said act of the 15th of May, 1856, subject to all its conditions, and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year first above written.

[L. S.] J. M. EDMONDS,
Commissioner.

150 (Written in red ink on margin:) Making in the aggregate fifty-six thousand four hundred and seventy-three acres and thirty-two hundredths of an acre.

DEPARTMENT OF THE INTERIOR, *April 7th*, 1863.

Approved, subject to the conditions and rights above mentioned.

J. P. USHER, *Secretary.*

GENERAL LAND OFFICE, *Feb.* 26, 1863.

I, J. M. Edmonds, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages one to two, inclusive, is a true and correct list of the tracts of land selected by the agent of the State of Iowa outside of the six and within the fifteen mile limits under the act of Congress approved the 15th of May, 1856, entitled "An act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of certain railroads in said State," the said selections being from the lands of the United States in the alternate sections designated by odd numbers most contiguous to the tier of sections within six sections in width on each side of the railroad "from the city of Dubuque to a point on the Missouri river near Sioux City, with a branch from the mouth of the Tete Des Morts to the nearest point on said road," known as the Dubuque & Sioux City (late Dubuque & Pacific) railroad, and being in lieu of the lands in the alternate sections designated by odd numbers within said six sections — width on each side of said road which the United States had legally sold or to which the right of pre-emption had legally attached prior to the period at which the right of the State inured under said grant; and they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of said act of the 15th of May, 1856, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at
151 the city of Washington, on the day and year first hereinabove written.

J. M. EDMONDS,
Commissioner.

DEPARTMENT OF THE INTERIOR, *April 7th*, 1863.

Approved, subject to the conditions and rights above mentioned.

J. P. USHER, *Secretary.*

(Written in red ink on margin:) Making in the aggregate twenty-one thousand and sixty-one acres and ninety-one hundredths of an acre.

GENERAL LAND OFFICE, *October* 31*st*, 1864.

I, J. M. Edmonds, Commissioner of the General Land Office, do hereby certify that the foregoing, on page one, is a true and correct list of the tracts of land within the six-mile limits granted to the State of Iowa by the act of Congress approved the 15th of May, 1856,

entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," being the vacant and unappropriated lands in the alternate sections designated by odd numbers for six sections in width on each side of the railroad from the city of Dubuque to a point on the Missouri river near Sioux City, with a branch from the mouth of the Tete Des Morts to the nearest point on said road, known as the Dubuque & Sioux City (late Dubuque & Pacific) railroad, within the State of Iowa, and they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of said act of the 15th of May, 1856, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

152 In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year hereinabove written.

[L. S.] J. M. EDMONDS,
Commissioner.

DEPARTMENT OF THE INTERIOR, *December 13th*, 1864.

Approved, subject to the conditions and rights above mentioned.
J. P. USHER, *Secretary.*

(Written in red ink on margin:) Making in the aggregate one hundred and fifty-nine acres and sixty-hundredths of an acre.

I, Aaron Brown, register of the State land office of the State of Iowa, do hereby certify that the foregoing are true copies of the certificates affixed to supplemental lists, numbered 33, 34, and 43, on file in this office, embracing the odd-numbered sections of land within the five-mile limits of the Des Moines river, which were approved and certified to the State of Iowa by the Department of the Interior, under act of Congress of May 15th, 1856, to aid in the construction of a railroad from the city of Dubuque to a point on the Missouri river near Sioux City, with a branch from the mouth of the Tetes Des Morts to the nearest point on said road, and that said lists embrace in the aggregate seventy-seven thousand six hundred and ninety-four and eighty-three hundredths of an acre (77,694.83).

In testimony whereof I have hereunto subscribed my name and affixed the seal of my office this 26th day of February, 1872.

[SEAL.] AARON BROWN, *Register.*

153 The foregoing is all the evidence introduced or offered by the parties in this suit or either of them at the trial or hearing thereof.

After due consideration the court rendered the following decree:

EDWARD K. GOODNOW *vs.* JOHN STRYKER.

This cause coming up this 2d day of October, 1883, for final disposition on *procedendo* from the supreme court of the State of Iowa, the court finds that the plaintiff, Edward K. Goodnow, is entitled to recover the principal sums shown to have been paid, but holds and de-

cides that he is entitled to recover interest thereon only from the date at which this suit was commenced—that is, to pay from the 5th day of August, 1876. The court further finds that the plaintiff is entitled to a lien to secure the payment of said claim, but that said lien is to be apportioned so that each tract, as hereinafter described, shall be liable for the amount of taxes assessed and levied thereon only and interest from Aug. 5, 1876.

It is, therefore, ordered and adjudged that the plaintiff have and recover of and from the defendant the sum of eight hundred and thirteen and $\frac{2}{100}$ ($814.02) dollars and costs of suit, taxed at —. It is further ordered and decreed that the said sum shall be a lien on the lands described in the petition as follows:

Eighty-five dollars on the south one-half of northeast one-quarter of section 29, town. 89, range 28; one hundred and seventy-five dollars on the northeast one-quarter of section 5, town. 88, range 28; one hundred and seventy-five dollars on the northwest one-quarter of section 19, town. 88, range 27; one hundred and seventy-five dollars on the east one-half of southwest one-quarter and northwest one-quarter of southwest one-quarter of section 7, town. 95,
154 range 28, and two hundred and three and two-hundredths dollars on the southeast one-quarter of section 7, town. 90, range 28, all in Webster county, Iowa.

It is further ordered that a special execution be issued, and that the land above described be sold thereunder, in accordance with this decree and the provisions of the law, and a general execution be issued for the purpose of making any balance that may exist after the sales hereinbefore ordered.

To each of which rulings and decisions of the court both parties then and there accepted.

And afterwards the plaintiff Goodnow gave due notice and perfected his appeal from the decision of said district court to the supreme court of Iowa.

GEORGE CRANE,
Attorney for Appellant.

Assignment of Errors.

1. The court erred in not allowing interest from dates of payments.
2. The court erred in not finding the issues for the plaintiff, and in not giving him a lien on all the lands for the whole amount of the decree.
3. The finding of the court is contrary to the law and the evidence in the case.
4. The finding or decision of the court is not in accordance with the law or the equity of the case.
5. The evidence shows that plaintiff was entitled to a decree for the taxes paid by his assignor, and interest thereon from dates of payments.

GEORGE CRANE,
Attorney for Plaintiff.

155 Endorsed: "Received copy of this abstract this 1st day of Nov., 1883. C. H. Gatch, att'y for defendant."

"It is hereby stipulated and agreed that this cause, including the cross-appeal of defendant, due notice of which is hereby admitted, may be submitted and tried by the supreme court of Iowa on this record and abstract and the assignment of errors hereafter to be filed by defendant.

Signed this 18th day of Dec., 1883.

GEORGE CRANE,
Att'y for Pl'ff.
C. H. GATCH,
Att'y for Def't.

George Crane, att'y for plaintiff, signed after interlineation."

"It is hereby agreed, stipulated, and admitted that the foregoing from page one to 154 is all the evidence offered or introduced by the parties at the trial of the above-entitled suit of Edward K. Goodnow *vs.* John Stryker.

Signed this 1st day of Nov., 1883.

GEORGE CRANE,
Att'y for Pl'ff.
C. H. GATCH,
Att'y for Def't."

156 On the 28th day of Jan., 1884, the defendant Stryker filed in the office of the clerk of said court an additional abstract, the same being in the words and figures following, to wit:

"*Additional Abstract.*

In the Supreme Court of Iowa. January Term, 1882, Des Moines, A.D. 1884.

E. K. GOODNOW *vs.* JOHN STRYKER.

Geo. Crane, attorney for appellant; C. H. Gatch, attorney for appellee.

On the 22nd day of May, 1882, plaintiff filed the following motion and showing for change of venue:

I, Edward K. Goodnow, being first duly sworn, depose and say that I am plaintiff in the above-entitled cause; that D. D. Miracle, judge of this court, is, to the best of my knowledge and belief, so prejudiced against me that I cannot obtain a fair trial before him, and that the existence of such prejudice was not known to me before the last continuance of this cause.

E. K. GOODNOW.

Duly verified.

John I. Mullany, Edwin B. Farley, and W. P. Dyer, being first duly sworn, depose and say that they are not related to the plaintiff in this action nearer than the fourth degree, nor do they nor any of

them stand in the relation of servant, agent, or employé of said plaintiff; nor are they in any manner interested in the result or issues of this action; and they do verily believe that the Hon.
157 D. D. Miracle, judge of the circuit court of Iowa in and for Webster county, is so prejudiced against said plaintiff that he cannot obtain a fair trial of said cause before said judge, and such prejudice was unknown to plaintiff before the last continuance.

JOHN I. MULLANY.
EDWIN B. FARLEY.
W. P. DYER.

Duly verified.

Which motion was, on the same day, by the court sustained, and defendant at the time excepted to the order sustaining the same.

Assignment of Errors on Defendant's Appeal.

1st. The court erred in sustaining plaintiff's motion for change of venue.

2d. The court erred in allowing any recovery in this suit.

C. H. GATCH,
Attorney for Defendant."

157½ And said cause was submitted to said supreme court upon the foregoing record, together with the arguments, in print and orally, of counsel of both parties; and on the 4th day of June, 1884, said court filed its written opinion affirming the judgment of the lower court, with certain modifications, as stated in the opinion, said opinion being in the words and figures following, to wit:

"EDWARD K. GOODNOW, App'l't, *vs.* JOHN STRYKER.

Appeal from Webster district court.

The plaintiff brings this action in equity as assignee of an account for taxes alleged to have been paid by the plaintiff's assignor, The Iowa Homestead Company. The land upon which the taxes
158 were paid belongs to the defendant. The taxes in question were paid by the Iowa Homestead Co. under the supposition entertained by it at the time that it was the owner of the land, and the circumstances taken together were such as to raise an implied promise on the part of the defendant to repay the taxes. The court rendered a decree in the plaintiff's favor for the amount, and allowed him interest on the same from the time of the commencement of the action, and allowed a lien upon the different Government subdivisions for the amount paid upon each subdivision, respectively. The plaintiff appeals.

GEORGE CRANE,
For Appellant.
C. H. GATCH,
For Appellee.

ADAMS, *J.*:

The plaintiff contends that he should have been allowed interest from the time of the payment of the money, and should have
159 been allowed a lien upon the whole land for the whole amount paid. So far as these questions are concerned, the case is similar in respect to its facts to Goodnow *vs.* Litchfield, decided at the last term. According to the ruling in that case, the plaintiff's position must be sustained and the judgment must be modified & affirmed."

160 And on the 5th day of June, 1884, final judgment and decree was entered in said cause, said decree being in the words and figures following, to wit:

"EDWARD K. GOODNOW
vs. } 10767.
JOHN STRYKER.

This cause coming up for final hearing this 5th day of June, 1884 the plaintiff appearing by his attorney, George Crane, and the defendant, John Stryker, by C. H. Gatch, his attorney; and the cause being duly submitted on the pleadings, evidence and arguments of counsel, and the court having duly considered the same finds the issues in favor of the plaintiff, Edward K. Goodnow.

It is, therefore, ordered, adjudged and decreed that plaintiff have and recover of and from the defendant the sum of ($1,092.61)
161 ten hundred ninety-two & $\frac{61}{100}$ dollars and costs of suit, taxed at on- hundred eighty-eight & $\frac{15}{100}$ dollars, and this decree be, and is hereby, made a special lien on the following-described real estate: The north half of the northeast quarter of section 29, township 89, range 28; the northwest quarter of section 5, township 88, range 28; the northwest quarter of — 19, township 88, range 27; the east half and southwest quarter, and northwest quarter of southwest quarter, and the southeast quarter of section 7, township 90, range 28, all in Webster county, Iowa, from the date of the decree below, to wit, Oct. 2d, 1883, and that he have a special execution, and that said real estate be sold thereunder according to law, and if the sale does not realize enough to satisfy this decree and costs then plaintiff shall have general execution for the balance."

162 And afterwards, upon motion of the defendant Stryker a supplemental decree or certificate was allowed and ordered to — made part of the record in this cause, and the same is duly entered of record as of the June term, 1884, of said supreme court, and the same is in the words and figures following, to wit:

"EDWARD K. GOODNOW
vs. } 10767.
JOHN STRYKER.

And now, on the application of the defendant, John Stryker, it is certified by the court here and ordered to be made part of the record herein that by the answer of defendant in the defendant's assign-

ment of errors in the additional abstract and on the hearing in said cause the defendant claimed immunity from the entire demand and claim of plaintiff on the ground that, as he claimed, the same demand and claim had been adjudicated against plaintiff's
163 assignor, The Iowa Homestead Company, by the Supreme Court of the United States in the case of The Iowa Homestead Company against The Des Moines Navigation & Railroad Company, this defendant, and others at the October term thereof, A. D. 1872, and that our decision herein was and is against the immunity so claimed by defendant.

And it is further certified and ordered to be made part of the record herein that by defendant's answer and on the hearing in said cause defendant claimed immunity from said entire claim and demand, because, as was claimed, the alleged cause of action, not having accrued within six years immediately preceding the commencement of the action, was barred by the New York statute of limitations, and that to determine whether or not it was so barred it became material and necessary to decide whether or not the decision of the
164 Supreme Court of the United States in the case of said G. Wolcott *vs.* The Des Moines Navigation & Railroad Company was a final determination of the question therein decided in order to determine when the plaintiff's cause of action accrued, and that our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed because of our said decision that said determination was not final.

Given under my hand, at Cedar Rapids, this 19th day of June, 1884.

JAS. H. ROTHROCK,
Chief Justice Sup. Court of Iowa."

165 And on the 15th day of July, 1884, there was filed in the office of the clerk of said court a writ of error, and the same is hereto attached and returned herewith, and a true copy thereof is retained in said clerk's office.

There was also filed in the office of the clerk of said court a citation, and the same is hereto attached and returned herewith, and a true copy thereof is retained in the office of said clerk.

166 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said supreme court before you, between Edward K. Goodnow and John Stryker, wherein was drawn in question the validity of the authority exercised under the State of Iowa on the ground of its being repugnant to the laws of the United States, and the decision was in favor of the validity of such authority, and wherein certain rights, privelages, and immunities were claimed under a certain judgment of the Supreme

Court of the United States and authority exercised under the United States, and the decision was against the rights, privelages, and immunities so claimed, a manifest error hath happened, to the great damage of the said John Stryker, as by his complaint
167 appears, we, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, *of* the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws & custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 15th day of July, A. D. 1884.

[Seal U. S. Circuit Court, Southern District Iowa.]

E. R. MASON,
Clerk U. S. Circuit Court, S. Dist. of Ia.

Approved—
JAS. H. ROTHROCK,
Chief Justice of Supreme Court of Iowa.
July 14th, 1884.

[Endorsed:] 10767. E. K. Goodnow *vs.* John Stryker. Writ of error. Filed July 15, 1884. G. B. Pray, clerk sup. court.

168 The United States of America to Edward K. Goodnow, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein John Stryker is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James H. Rothrock, chief justice of the supreme court of Iowa, this 14th day of July, in the year of our Lord one thousand eight hundred and eighty-four.

[Seal of the Supreme Court of Iowa.]

JAS. H. ROTHROCK,
Chief Justice Supreme Court of Iowa.

169 Due service of the within is hereby acknowledged this 16th day of July, 1884.

GEORGE CRANE,
Att'y for Edward K. Goodnow.

[Endorsed:] E. K. Goodnow *vs.* John Stryker. Citation.

170 On the 15th day of July, 1884, there was filed in the office of the clerk of said court a writ-of-error bond, and the original remains lodged in said clerk's office. Said bond, with the endorsements thereon, is in the words and figures following, to wit:

"Know all men by these presents that we, John Stryker and James Callanan, are held and firmly bound unto Edward K. Goodnow in the full and just sum of one thousand dollars, to be paid to the said Edward K. Goodnow, his executors or adm'rs; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed with our hands & dated this 10th day of March, 1884.

171 Whereas lately at a term of the supreme court of Iowa, in a suit depending in said court between Edward K. Goodnow, plaintiff, and John Stryker, defendant, judgment was rendered against the said John Stryker, and the said John Stryker having obtained a writ of error and filed a copy thereof in the clerk's office of said court to remove the judgment in the aforesaid suit, and a citation directed to the said Edward K. Goodnow, admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., the second Monday of October next, now, the condition of the above obligation is such that if the said John Stryker shall prosecute said writ of error to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; otherwise in full force and virtue.

JOHN STRYKER,
By C. H. GATCH, *His Att'y.*
J. CALLANAN, *Security.*

172 Endorsed: "The within bond is hereby approved this 14th day of July, 1884. James H. Rothrock, chief justice sup. court of Iowa."

173 STATE OF IOWA, *ss:*

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record in said cause, embracing the abstracts of both parties and endorsements and stipulations thereon, the opinion of the supreme court of Iowa, final judgment and decree, supplemental decree or certificate, and writ-of-error bond.

I further certify that the original writ of error and citation are hereto attached and returned herewith and true copies thereof are retained in my office, and this return is made in obedience to said writ of error.

In testimony whereof witness my signature and the seal of said court, at Des Moines, in said State, this 7th day of August, 1884.

[Seal of the Supreme Court of Iowa.]

G. B. PRAY,
Cl'k Sup. C't State of Iowa.

174 The foregoing entitled cause having been decided by the supreme court of Iowa on a former appeal, to wit, on the 12th day of June, 1883, and counsel for def't in error upon an examination of the foregoing transcript has requested that the said opinion of June 12, 1883, be added to this transcript as part of the return, *and* the same is now done, and the certificate upon page 170 shall be deemed to relate to and include the opinion herein mentioned, as well as other record therein referred to.

Said opinion of June 12th, 1883, is duly entered of record and is in the words and figures following, to wit:

175 EDWARD K. GOODNOW, Appellant, *vs.* JOHN STRYKER.

Appeal from Webster circuit court.

Action to recover for certain taxes paid to Webster county on certain land in that county belonging to the defendant, John Stryker. The taxes were paid by the Iowa Homestead Co., which supposed itself to be the owner of the land, and they were paid under such circumstances as to raise an implied promise on the part of the defendant to reimburse the homestead Co. This fact was established by an adjudication in this case. See Goodnow *vs.* Stryker, 54 Iowa, 326, where this case is reported upon a former appeal. The plaintiff became entitled by assignment to all the rights of the home-

176 stead Co.

After the case was remanded upon the former appeal two additional defenses were set up, one or both of which must have been held sufficient. The court dismissed the plaintiff's petition, and he again appeals.

GEORGE CRANE,
For Appellant.
THEODORE HAWLEY AND
C. H. GATCH,
For Appellee.

ADAMS, *J.:*

I. The defendant pleaded as one of its additional defenses that the plaintiff's right of recovery is barred by a prior adjudication, to wit, an adjudication in the case of The Iowa Homestead Co. *vs.* The Des Moines Navigation & Railroad Co., John Stryker, *et al.*, reported in 17 Wallace, 153. To this plea the plaintiff replies in substance that if *if* it should be conceded that the court made

177 an adjudication in that case denying a right of recovery for the taxes in question in this case, yet this action is not barred, because a right of recovery has arisen since that time. The fact relied upon as giving such rights of recovery is that the defendant now claims, as he did not then, the benefit of the payments made by the homestead Co. After this action was instituted a petition was filed in the case by Webster county averring, among other things, that the taxes in question have never been paid by any one, and that the same are now due to the county from the defendant. To this petition the defendant answered, averring

"that all of said taxes mentioned in said petition were duly paid by the Iowa Homestead Co. * * * and said defendant is no longer liable therefor." The question presented is as to
178 whether, if the payments in the first instance were officious, as we may assume was held, and the defendant for that reason was not liable, the subsequent adoption of the payments for the purpose of escaping liability to the county should be regarded as an adoption of the payment as between the defendant and plaintiff.

If the plaintiff's assignor had made the payments in the name of the defendant as his assumed agent any act of the defendant indicating an intention to claim the benefit of the payments could constitute a ratification of the acts by which the payments were made. But the defendant contends that the case is different where a person pays another person's debt, not under a claim of action for such person, but under the mistaken supposition that the debt is due from himself. The defendant's position is that in such case
179 there is no act of assumed agency to ratify. It must be conceded, we think, that in one sense this is so. The plaintiff's assignor did not hold himself out as the defendant's agent; nevertheless, when the defendant claims the benefit of the payments he elects to treat the acts of payment as done for himself. Having elected to so treat the acts, he ought not to complain if the court treats them in the same way. National justice certainly requires that if the defendant has the benefit of payments as discharging his liability to the county, he should reimburse the plaintiff, whose assignor made the payments. If we were to take any other view it appears to us that we should attach more importance to the form than the substance of things. We do not overlook the fact that under ordinary circumstances every tax-payer has the right,
180 as between himself and third persons, to pay his own taxes in his own way, and to pay them to the county to which they are due, and not be compelled to run after a self-substituted creditor and make payment to him. Where, therefore, such payment is made by a third person the tax-payer has a right to ignore the payment if he chooses to do so. But if he chooses not to ignore, but to claim the benefit of it, we see no reason why we may not regard him as treating the act of payment as done for him; and if we do so regard him there is no difficulty in finding an implied promise to reimburse the payer or his assignee.

We ought, perhaps, to say in this connection that the doctrine has been announced that there can be no ratification of an act
181 not done avowedly for the principal. Story on Agency, section 251; Fellows *vs.* Commissioners, 36 Barb., 655. But the case before us is peculiar. The act done was such that it necessarily inured to the defendant's sole benefit. Besides, the circumstances under which the act was done should not be overlooked. The defendant neglected the payment of the taxes, which was a duty of public concern. He allowed the plaintiff's assignor, under an honest claim of title to the land, to discharge this duty for several years in succession. Now, while the plaintiff is not allowed, by reason of the prior adjudication, to set up these facts as alone sufficient to

create a liability on the part of the defendant, they may be considered, we think, in connection with the fact that the defendant has since claimed the benefit of the payments as sufficient to render such claim of benefit a ratification, if it otherwise would not be.

182 II. We come next to consider the second additional defense, and that is that the claim is barred by the statute of limitations. In considering this question we have no occasion to inquire when the payments were made. If the defendant's liability arose by reason of his adoption of the payments as we hold, and that was done by his pleading in this case, the action is not barred.

Whether the action was premature is a different question, and one not raised. We will merely say that if at the time the defendant adopted the payments he had tendered to the plaintiff the money necessary to discharge his liability it would seem reasonable that he should not be held liable for the costs theretofore accrued. But whether he could, while denying his liability, be heard, under

183 the circumstances, to say that the action was premature, is, to say the least, doubtful.

We have considered the two additional defenses set up by the defendant, to wit, prior adjudication and the statute of limitations, and having reached the conclusion that they are not tenable we have to say that the judgment must be reversed.

Endorsed on cover: Iowa supreme court. No. 318. John Stryker, plaintiff in error, *vs.* George Crane, administrator of Edward K. Goodnow, deceased. Filed 26th September, 1884.

FILED.
NOV 1 1887
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

R. B. CHAPMAN, Plaintiff in Error,
vs.
GEORGE CRANE, Adm'r, Defendant in Error. } No. 214.

SAME
vs.
SAME } No. 215.

J. B. PLUMB, Plaintiff in Error,
vs.
GEO. CRANE, Adm'r, Defendant in Error. } No. 350.

GEO. W. WELLES, Exec'r, *et al.*, Plaintiff in Error,
vs.
GEO. CRANE, Adm'r, Defendant in Error. } No. 669.

E. H. LITCHFIELD, Exec'r, Plaintiff in Error,
vs.
GEO. CRANE, Adm'r, Defendant in Error. } No. 670.

E. H. LITCHFIELD, Adm'r, Plaintiff in Error,
vs.
GEO. CRANE, Adm'r, Defendant in Error. } No. 671.

C. H. GATCH and WILLIAM CONNOR, for Plaintiffs in Error.
GEO. CRANE, for Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

By permission of the Court we submit the above-entitled causes on our part on our arguments filed in numbers 42, 43, 44, and 45, or parts of them, as follows:

Numbers 669, 670, and 671 on argument in number 42 and division II of that in number 43.

Number 350 on division I of argument in number 43, together with so much of the statement contained in the opening argument as is pertinent, with the addition, as shown by the deposition of plaintiff in error (Rec., fols. 25–7), that, in the former suit the adjudication in which is plead in estoppel, at its commencement, Edward Wade, appearing of record to be the owner of the land to which this particular controversy relates, was for that reason made a party defendant, and that plaintiff in error, being the equitable owner, appeared by counsel in the name of Wade and made defense, contributing his proportion of the expense of the litigation.

Number 215 on division II of argument in number 42 and number 214 on argument in number 43—the reply in number 42 to be taken, as far as applicable, as part of the argument in each of the cases.

C. H. GATCH and
WM. CONNOR,
Attorneys for Plaintiffs in Error.

MEMORANDA AS TO QUESTIONS INVOLVED IN ALL THE CAUSES.

Six questions only are made by us in argument, five of which are discussed consecutively in the opening arguments in numbers 42, 43, and 44 as points I and II in each of the first two cases, and point I in the third. The sixth is discussed as point II in number 45. Of these questions the first and second are involved in number 42, the third and fourth in numbers 43 and 214, the fourth and fifth in number 44, the fourth and sixth in number 45, the first, second, and fourth in 669, 670, and 671, respectively, the fifth in number 350, and the second in number 215.

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Office Supreme Court U. S.
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CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1886.

No. ~~917~~ 42

JOHN STRYKER, PLAINTIFF IN ERROR,

vs.

EDWARD K. GOODNOW, DEFENDANT IN ERROR.

ON ERROR FROM THE SUPREME COURT OF IOWA.

ARGUMENT FOR PLAINTIFF IN ERROR.

C. H. GATCH AND WM. CONNOR, FOR PLAINTIFF IN ERROR.
GEO. CRANE, FOR DEFENDANT IN ERROR.

P. C. Kenyon, Publisher Law Briefs, Des Moines.

IN THE

Supreme Court of the United States.

JOHN STRYKER, *Plaintiff in Error*,
vs.
EDWARD K. GOODNOW,
Defendant in Error.

On Error from Supreme Court of Iowa.

C. H. GATCH AND WILLIAM CONNOR, *for Plaintiff in Error.*
GEO. CRANE, *for Defendant in Error.*

ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

At the October term, 1868, of the district court of Webster county, Iowa, the Iowa Homestead Company, assignor of defendant in error, an Iowa corporation, commenced a suit against the Des Moines Navigation & Railroad Company, another Iowa corporation, and numerous grantees of the latter, including plaintiff in error, to establish title in said homestead company to the so-called "Des Moines river lands," and with a view to alternative relief, in the event of an adverse decree on the question of title, made the following allegation in its petition:

> The said plaintiffs have been in possession of the lands claimed by them, themselves or their vendees in contract, *since 1861*. They have paid the taxes thereon to the state of Iowa *since*, in all amounting to eighty thousand dollars, and if their title has failed, they are entitled to have their taxes refunded *since 1861*, by the holder of the legal title who has not paid them (Fol. 23.)

And prayed —

That in the event of a decree that the plaintiff's present title or any part of it has failed, the said Des Moines Navigation & Railroad Company and its assigns may be decreed to repay the plaintiff all the taxes which he has paid on said land and interest thereon (24).

The answer to this part of the petition is as follows:

As to whether or not the said complainant and its vendees have been in possession of and paid said taxes on the lands claimed by them *since 1861*, to the amount of $80,000, this defendant is ignorant and uninformed saved by the said complainant's said bill of complaint, but expressly avers that the possession of the said lands by the said complainant and its vendees *since 1861*, is and has been unauthorized and wrongful (26).

The petition also contained the following allegation:

The said navigation company conveyed certain parcels of the land now claimed by plaintiff to the following persons, among others: Samuel G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, W. J. McAlpine, Richard B. Chapman, Albert Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade and *John Stryker*.

The suit having, as stated, been commenced in the district court of Webster county was removed to the United States circuit court, and in due course of litigation this court affirmed the decree of the United States circuit court for Iowa, establishing title to the lands in the Des Moines Navigation & Railroad Company, and its several grantees, and denying the right of the homestead company to recover the taxes paid.

On the question of complainant's right to the alternative relief claimed, this court say — *Homestead Company vs. Valley Railroad*, 17 Wall., p. 167:

It is true, in accordance with our decision, that the taxes on these lands were the debt of the defendants, which they should have paid, but their refusal or neglect to do this did not authorize a contestant of their title to make them its debtor by stepping in and paying the taxes for them without being requested so to do. Nor can a request be implied in the relation which the parties sustained to each other. There is nothing to take the case out of the well established rule as to voluntary payments. If the appellants, owing to their too great confidence in their title have risked too much, it is their misfortune; but they are not, on that account, entitled to have the taxes voluntarily paid by them refunded by the successful party in this suit.

In the two cases of the *Dubuque & Sioux City Railroad Co. vs. the Supervisors of Webster County, Iowa*, and *Iowa Homestead Co. vs. same*, 40 Iowa, 16, the question was as to the right of recovery of these identical taxes by the assignor of defendant in error from Webster county, and it was held that such recovery could not be had, for the reason stated in the following extract from the opinion:

> The payments having been made *voluntarily*, with knowledge of all the facts, believing that, under the law, the lands belonged to the plaintiffs, the mistake was one of law, and no action at the common law or in equity lies to recover the money thus paid. Page 17.

It will thus be seen that the sole ground upon which the right of recovery was denied was that the payment of the taxes had been voluntary.

In *Garrigan vs. Knight*, 47 Iowa, 525, it was held that —

> When the title to real estate is in controversy, and the taxes thereon are voluntarily paid by one of the parties to the controversy, whose claim is afterwards adjudged to be invalid, he cannot recover the amount so paid from the owner.

The decision in this case has never been overruled otherwise than by being in conflict with later decisions in the numerous "Goodnow cases," of which the case at bar is one.

In the first of these cases, that of *Goodnow vs. Moulton*, 57 Iowa, p. 555, prosecuted by Goodnow as assignee of the homestead company for the recovery of part of these same taxes, the defense of voluntary payment having been relied upon, and the case of *Homestead Company vs. Valley Railroad* having been cited as authority, the supreme court of Iowa, very strangely overlooking the above quoted paragraph of the opinion in that case, say, in their opinion, page 560:

> We have looked in vain for anything in the statement of the questions involved or the opinion of the court, which tends to show with any degree of certainty that the right of the plaintiff to recover the taxes paid was in the case.

And, more strangely still, subsequently, in *Goodnow vs. Stryker*, 62 Iowa, 223, after having discovered the oversight in the Moulton case, it is said:

Since the decision in *Goodnow vs. Moulton*, we cannot follow the decision in *Iowa Homestead Company vs. Des Moines Navigation & Railroad Company.*

The question of voluntary payment having been thus disposed of, it became necessary for plaintiff in error to insist upon the decision in *Homestead Company vs. Valley Railroad* as an adjudication of the cause of action.

While it is true that Goodnow's assignor, the D. & S. C. R. R. Co. was not a party of record in the case of the *Homestead Company vs. the Valley Railroad*, it is abundantly shown by the record that it was the real, substantial plaintiff in the case, owning and controlling a majority of the homestead company stock and managing its business; that a majority of the directors of the homestead company were also directors of the railroad company, and that the suit was directed and controlled by the railroad company. The testimony upon this point, briefly stated, is as follows:

John B. Thompson (71), says he was treasurer and secretary of the *homestead company* from 1864 to 1873; that within a year after Morris K. Jesup became president of the Dubuque and Sioux City Railroad Company, which, according to Jesup's own testimony (80), was in the early part of the year 1866—the *railroad company* became the owner of *five-ninths of the stock of the homestead company*, and that after such change in the ownership of the stock *the board of directors of the homestead company was changed;* and that the railroad company "by owning a majority of the stock, *controlled the homestead company;*" and that "after Jesup became president of the railroad company, all stock of the homestead company held by the directors of the railroad company was transferred to the railroad company, amounting to five-ninths of the whole stock." The same witness says (73), referring to the former suit of *The Homestead Company vs. The Navigation Company*, and others: "The Iowa Homestead Company *never paid a dollar of the expenses.* It was never discussed *at the Iowa Homestead Company's meetings.*"

Morris K. Jesup (80), referring to the same suit, in answer to the question, "Who, *on behalf of said railroad company*, had the chief control and direction of said suit, and who employed, consulted with, and generally gave direction to the attorneys who had charge of it," said: "I am president, *and I presume if any directions were given I must have given them;* I do not know."

Another defense plead and relied upon, was, that at the time of the assessment and levy of the taxes in question for the year 1861—the claim embracing also those for 1862-3—the title to the lands on which they were levied was in the United States, and that they were, therefore, not subject to taxation, and that consequently their payment by the Dubuque & Sioux City Railroad Company, Goodnow's assignor, could not, upon any theory, entitle it or its assignee to repayment. For the part of the answer setting up this defense, see record (7). The certificate of the court shows that of the amount of the decree, $479 was for the taxes paid for that year.

The following is the certificate (157-9), which, together with the foregoing, will constitute a sufficient statement of the case, and will show how the questions to be made in argument have become vital in this case by reason of the previous decisions of the supreme court of Iowa in other similar cases:

CERTIFICATE.

And now on the application of the defendant, John Stryker, it is certified by the court here and ordered to be made part of the record herein, that $479.00 of the amount herein found and adjudged to be due from defendant to plaintiff was so found and adjudged as and for that amount paid by plaintiff's assignor, as and for taxes for the year 1861 on the lands in the petition described; that said lands are part of the so-called Des Moines river lands, granted by the United States to the state of Iowa by act of congress of August 8, 1846, entitled "an act granting certain lands to the territory of Iowa to aid in the improvement of the navigation of the Des Moines river, in said territory," the joint resolution of congress of March 2, 1861, entitled "a joint resolution to quiet title to lands in the state of Iowa," and the act of congress of July 12, 1862, entitled "an act confirming a land claim in the state of Iowa, and for other purposes," and that all of said lands are located above the Raccoon fork of said Des

Moines river; that the validity of said taxes and the levy thereof for the year 1861 was drawn in question herein by the defendant, Stryker, on the ground as maintained by him that the lands were public lands of the United States, at least until March 2, 1861, and if so, were not under the law of Iowa, taxable until the year 1862; and this court decided herein that said lands were subject to taxation by the state of Iowa for the year 1861, and that said sum of $479.00 was recoverable of defendant by plaintiff because the same were so subject to taxation for that year.

And it is further certified and ordered to be made part of the record herein, that by his answer and on the hearing in said cause, the defendant claimed immunity from the entire demand and claim of the plaintiff, on the ground that, as he claimed, the same demand and claim had been adjudicated against plaintiff's assignor, the Dubuque & Sioux City Railroad Company, by the supreme court of the United States, in the case of *The Iowa Homestead Company vs. The Des Moines Navigation & Railroad Company*, this defendant and others, at the October term thereof, A. D. 1872, which case was, as defendant claimed and maintained in this court, prosecuted by said Dubuque & Sioux City Railroad Company, for its own use and benefit, in the name of said Iowa Homestead Company, and that plaintiff's said assignor was therefore in such sense a party to said suit as to be bound and concluded herein by said adjudication therein. And that our decision herein was and is against the immunity so claimed by defendant.

ASSIGNMENT OF ERRORS.

The supreme court of the state of Iowa erred,—

I. In holding that the lands described in the petition, being part of the lands the title to which was released to the state of Iowa by the joint resolution of congress of March 2, 1861, "to quiet title to lands in the state of Iowa," were subject to taxation by the state of Iowa for the year 1861.

II. In holding that defendant in error is not estopped from prosecuting his cause of action herein by the judgment of the supreme court of the United States in the case of the *Homestead Company vs. Valley Railroad*, 17 Wallace, 153, and thereby denying the immunity claimed by plaintiff in error by reason of that judgment, under his defense of former adjudication.

ARGUMENT.

It is claimed that the record presents two federal questions, either decided or the decision of which was necessary to the decree rendered by the supreme court of Iowa, the first of which was erroneously decided against the plaintiff in error, and the second of which was either also erroneously decided against him, or its decision was wrongfully and erroneously evaded. As to each, the question whether or not it is a *federal* question, so involves the question whether or not the decision was or was not erroneous, that the same argument will apply to both.

I.

Was the question whether or not the land upon which the taxes in question were levied were subject to taxation for the year 1861, a federal question? And, if so, was it erroneously decided.

It is certified (157) that $479.00 of the amount of the judgment was on account of the taxes for 1861; that the lands are part of the lands known as "Des Moines River Lands," the title to which, according to repeated adjudications of this court, passed from the United States to the state of Iowa, under the joint resolution of congress of March 2, 1861, entitled "a joint resolution to quite title to lands in the state of Iowa;" that the validity of the tax levy for 1861 was drawn in question by plaintiff in error on the ground that the lands were, as public lands of the United States, exempt from taxation for that year; and that the decision of the court was that they were not so exempt, but were subject to taxation for the year 1861, and that said sum of $479.00 was recoverable because they were subject to taxation for that year.

By the seventh section of the act of congress, March 3, 1845, for the admission of the states of Iowa and Florida into the union, it was provided, among other things, that they shall "never interfere with the primary disposal of the public lands

lying within them, *nor levy any tax on the same whilst remaining the property of the United States;*" and by the fifth section of the supplemental act of same date, it was again provided that "*no tax shall be imposed upon lands the property of the United States.*"

Section 111, paragraph 7, of the Revision of 1860, in force when the tax in question was levied, provided that—

> Government lands entered or located, or lands purchased from this state, shall not be taxed for the year in which the entry, location or purchase is made.

The supreme court of Iowa in *McGregor & M. R. R. Co. vs. Brown*, 39 Iowa, 655, say, on page 656:

> Government lands are not taxable until the next year after they are patented (Revision of 1860, section 4111).

And in *Iowa Falls vs. Cherokee County*, 37 Iowa, 483, on page 493, it is said:

> Since plaintiff became the owner of the land, as evidenced by the patents, on the 5th day of July, 1871, they were not taxable until 1872.

To the same effect are *Goodrich vs. Beaman*, 37 Iowa, 563, and *Iowa Falls Co. vs. Woodbury Co.*, 38 Iowa, 498.

There was, therefore, and could have been no *question* under the revenue laws of Iowa, whether or not the lands were taxable for the year in which the state should acquire title from the United States. The provision on that subject was too clear to require construction or to be open to question. And so, as just shown, the supreme court of the state has been accustomed to assume.

On the other hand, whenever the question of the validity of the tax levy on any of these lands for the year 1861, has been before that court, the *question* has been, whether or not the grantees of the state first acquired a taxable interest in the lands by the joint resolutions referred to, or previously, by force of the original grant of August 8, 1846, and the erroneous certification of them to the state thereunder. This will be seen by reference to the cases of *Stryker vs. Polk County*, 22 Iowa, 131, and *Litchfield vs. The County of Hamilton*, 40 Id., 66.

In the former the question and reasoning of the court is thus stated in one of the head-notes:

Prior to the joint resolution of March 2, 1861, the *technical*, but not the *absolute*, title to these lands, within the meaning of our statute exempting from taxation the property of the federal govenment, was in the United States. That resolution recognized the equitable title of the *bona fide* purchaser from the state, to the extent of rendering these lands liable to taxation *from the date of their conveyance to such purchasers.*

In the other case it is said, on page 67:

On the 2d day of March, 1861, for the purpose of *securing* and *perfecting* to *bona fide* purchasers under the state the title of the lands above the Raccoon fork, which had been previously certified to the state under the act of August 8, 1846, congress adopted a joint resolution releasing to the state of Iowa these lands. An act of congress of July 12, 1862, for the purpose of *confirming* the title to the lands supposed to have been granted by the act of August 8, 1846, to the state, extended the grant to the northern line of the state. * * *

Plaintiff insists that these lands were not taxable until after the confirmatory acts above referred to. The position is assumed on the ground that the title, up to that time, was in the United States, and the state could not, therefore, levy taxes upon the lands until the plaintiff or his grantor had acquired title.

This precise question was determined in *Stryker vs. Polk County*, 22 Iowa, 131, * * * it was held that the lands were taxable for 1859 and subsequent years. The decision is based upon the doctrine that the *confirmatory* congressional legislation related back to the *first grant* by the state and *perfected* the title from that time.

The precise question was determined by this court in *Litchfield vs. Webster County*, 101 U. S., 773, and *Litchfield vs. County of Hamilton*, briefly reported in a note following the opinion in the Webster county case, on page 781.

In the first mentioned case, referring to the joint resolution of 1861, it is said, on pages 774-5:

The grant made by that resolution was just as much an original grant as if the act of 1846 had never been passed. The order of the executive department reserving them from sale, neither transferred any title to, nor created any interest in, the state. It simply retained the ownership in the United States, while the subsequent gift was undoubtedly induced by what had happened before; the United States, until it was made, continued to be the proprietor of the lands, both in law and in equity. Such being the case, they were not taxable before March 2, 1861. * * *

Under the revenue laws of Iowa in force at that time, government lands entered or located, or lands purchased from the state, could not be taxed for the year in which the entry, location or purchase was made.

After citing, in support of the proposition stated in the last paragraph, *McGregor & M. R. R. Co. vs. Brown*, *supra*, and other Iowa cases above cited, it is added:

The revenue year of the state for 1861 commenced before March. It is clear, therefore, that the lands were not taxable that year. They were neither entered, located, purchased from the state, nor patented within the meaning of the revenue laws until then.

Was it a *question* with the court whether or not, *assuming* that the lands "were neither entered, located, purchased from the state nor patented within the meaning of the revenue laws until then" they were taxable for that year? Or, on the contrary, was not the question and only question considered by the court, whether or not, *assuming* that "under the revenue laws of Iowa in force at that time government lands entered or located, or lands purchased from the state, could not be taxed for the year in which the entry, location or purchase was made," these lands *were* entered, located or purchased *in the year 1861.*

If there were any room for doubt in the language of the opinion, as there clearly is not, the decree of the court is decisive of the matter, affirming, as it does, the decree of the circuit court which held that the lands were not subject to taxation for any of the years 1859, 1860 or 1861. That the question as to the validity of the taxation for the year in question was considered and disposed of as a federal question, is, if possible, made clearer still by the different decrees rendered by this court in the two cases. The Webster county case was on appeal from the circuit court, and therefore for decision on *all questions*, while the Hamilton county case came from the state supreme court on writ of error, and consequently for decision *on federal questions only.* In each case Litchfield asked to be relieved from the payment, not only of the taxes for the years 1859, 1860 and 1861, but also of the statutory ten interest and

penalties on account of the taxes both for these and subsequent years.

In the Webster county case full relief was granted, with the exception of the allowance of only six per cent. interest on taxes for the years subsequent to 1861, while in the Hamilton county case, as appears from the brief report contained in the note before referred to, relief from payment of penalties was refused, *for the reason* that "the liability of Litchfield for interest and penalties *after 1861* did not present any federal question," while "the decree of the state court was reversed and the cause remanded with directions to enjoin the collection of all taxes and charges on the lands in question for the years 1859, 1860 *and 1861.*"

II.

Was the question whether or not defendant in error was estopped by the judgment of the court in the case of *Homestead Company vs. Valley Railroad* a federal question; and, if so, was it erroneously decided?

Assuming that had Goodnow's assignor, the Dubuque & Sioux City Railroad Company, been a *party of record* in the case of *Homestead Company vs. Valley Railroad*, the defense of former adjudication would present a federal question, it is claimed that while it was not named as a party, it was, as to the taxes in question, the real party in interest—the taxes for these years having been paid by it—and for all purposes the efficient *actor* in that case—as is shown by the evidence referred to (177–81) as part of the "statement." As to the taxes for these years, therefore, a recovery must have been sought *for the use* of the railroad company. The further material fact on this point is that the railroad company *was the warrantor* to the homestead company of the title in controversy.

It will be seen by reference to the extracts from the pleadings contained in the statement that the taxes for the years 1861–62–63, were claimed in the same terms, as were those of

the subsequent years, as part of the whole amount of $80,000, claimed to have been paid. In *Goodnow vs Litchfield*, 59 Iowa, 226, the defense of former adjudication as to the taxes of the subsequent years was sustained.

If, then, the issue made in the case of the *Homestead Company vs. Valley Railroad* embraced the taxes for the years subsequent to 1863, it is clear it must also have embraced those in controversy in the case at bar; and, as has just been shown, the relation of the railroad company to that suit was such that it, and plaintiff as its assignee as well, is in that respect bound by the *claim as made and adjudicated.*

Assuming then that these taxes were claimed in the former suit, was the Dubuque & Sioux City Railroad Company "substantially a party to that action?"

That action involved both the question of title to the lands and the right of the homestead company, for the use of the railroad company, to be reimbursed the taxes paid by the latter in the event of the question of title being decided adversely to it; and it would be a mistake, therefore, to assume that the railroad company sustained no other relation to it than as warrantor of the title to its grantee, the homestead company.

In *Tarleton vs. Johnson*, 25 Alabama, 300, upon a full review of the authorities, it was held that parol evidence is admissible to show who were real parties in interest in an action, and that the judgment in an action may be conclusive as against persons connected therewith, by parol, as "real defendants, although they were not parties to the record."

In Freeman on Judgments, sections 174 and 175, it is said:

> Neither the benefit of judgments on the one side, nor their obligations on the other, are limited exclusively to parties and their privies, or, in other words, there is a numerous and important class of persons who, being neither parties upon the record nor acquirers of interests from those parties after the commencement of the suit, are nevertheless bound by the judgment. Prominent among these are persons *on whose behalf* and *under whose direction* the suit is prosecuted or defended, in the name of some other person. * * * For the purpose of showing that parties not named in the record were the real parties in interest,

and conducted the suit in the name of others who were only nominal parties, parol evidence may always be offered, and when the showing is made, the real parties are concluded by the judgment.

In *Chicago vs. Robbins*, 4 Wallace, 657, this court, on page 674, stating the rule generally as to when persons other than parties of record are bound by the adjudication, say:

> Persons notified of the pendency of a suit in which they are directly interested, must exercise reasonable diligence in protecting their interests, and if, instead of doing so, they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efefficently, they cannot subsequently be allowed to turn around and evade the consequences which their own conduct and negligence have superinduced.

In *Conger vs. Chilcote*, 42 Iowa, 18, it was held that—

> One who is benefited by the prosecution or an action of which he has notice, is to be regarded as a party in interest, although his name does not appear therein, and he is bound by the judgment rendered.

And that—

> No particular form of notice is required, and it may be given, either orally or in writing.

The first of these propositions having been in substance held by the court below in an instruction to the jury, the supreme court, on pages 23–4, say:

> The instruction clearly announces the rule, that in order to hold defendant so bound, he must be found to have been a party in interest. In such case he would be bound, though his name were not used as a party to the action. We understand the instruction, so far, to mean this: If the action was prosecuted *in whole or in part for defendant's benefit*, if he were to share in the fruits of the judgment, he is to be regarded as a party in interest, and in that case is bound by the judgment rendered therein. We think there can be no doubt of the correctness of the rule. If he had such an interest in the matter involved in the action, and entrusted it to the Mt. Pleasant bank for settlement by suit, he will be estopped to deny the matters adjudicated therein.

Barney vs. Dewey, 13 Johns, 224, was an action for damages for fraud in the sale of a horse by Dewey to Barney which belonged to a third party, whose name also was Dewey, and who had previously recovered the value of the horse in an action against Barney. The defendant in the last action was a

witness on behalf of plaintiff in the first one, and the adjudication in the first was plead as a defense in the last. In the opinion of the court, page 225, it is said:

> There is no allegation of notice to the defendant of the pendency of the suit brought by Thadeus Dewey, but there is an averment of a fact tantamount. It is alleged that the defendant was a witness on that trial, and proved, himself, that he did not own the horse when he sold him to the plaintiff.

In *Stoddard vs. Thompson*, 31 Iowa, 80, the material facts briefly stated, were as follows: Thompson having wrongfully obtained possession of a note belonging to Stoddard, made by one Wilson, and commenced suit against Wilson for its collection, Stoddard employed counsel to defend the action, agreed with Wilson to pay the cost of defending, and was a witness in the case. The defense set up was that Stoddard, and not Thompson, was the owner of the note. Judgment on this issue was rendered in favor of Thompson. Stoddard subsequently commenced the suit, the decision in which is here cited, against Thompson and others, to enjoin the collection by Thompson of the Wilson judgment and certain other notes obtained by him of Stoddard at the same time and under the same circumstances that the Wilson note was obtained. He was held entitled to relief asked as to the notes, but not as to the judgment. The court, in the opinion, page 82, referring to the issue as to the ownership of the Wilson note made in the former suit, say:

> The issue thus made was determined in favor of Thompson, and plaintiff, Stoddard, *though not a party to the suit*, is bound by the adjudication. One who, *though not a party*, defends or prosecutes an action *by employing counsel, paying costs, and by doing those things which are usually done by a party*, is bound by the judgment rendered therein.

If the railroad company was in such sense a party as to be bound by the judgment, it can make no difference that the question whether or not it was such a party is not, by itself, a federal question. Plaintiff in error cannot be deprived of his immunity as a party because the fact that the railroad company was also a party, was shown by other than the usual record evi-

dence, and a question of law was raised as to whether or not the evidence relied on was sufficient.

In *Mackay vs. Dillon*, 4 Howard, 421, it is said that when it is sought to give effect to evidence, "for purposes which involve questions giving this court jurisdiction, then the decisions of state courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed in a similar manner as if a like question had arisen in a supreme court of error of a state when reviewing the proceedings of inferior courts of original jurisdiction."

And in *Kennedy's Executors vs. Hunt's Lessee*, 7 Howard, 586, involving a congressional grant, and the question being as to whether or not a ruling of the state court rejecting evidence of a certain survey of the grant raised a federal question, the court, on page 594, held that it did not, but for the reason that "it could not change the grant nor affect its validity in any degree."

The same rule must apply for the same reason whenever, in any similar case, it is sought to give effect to any fact or question "for purposes which involve questions giving this court jurisdiction."

C. H. GATCH AND
WILLIAM CONNOR,
Attorneys for Plaintiff in Error.

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IN THE

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OCTOBER TERM, 1886.

No. ~~810.~~ 4/3

JOHN STRYKER, PLAINTIFF IN ERROR,

vs.

EDWARD K. GOODNOW, DEFENDANT IN ERROR.

ON ERROR FROM THE SUPREME COURT OF IOWA.

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P. C. Kenyon, Publisher Law Briefs, Des Moines.

IN THE

Supreme Court of the United States

JOHN STRYKER,
Plaintiff in Error,
vs.
EDWARD K. GOODNOW,
Defendant in Error

No. 318.

On Error from Supreme Court of Iowa.

C. H. GATCH AND WILLIAM CONNOR, *for Plaintiff in Error.*

GEO. CRANE, *for Defendant in Error.*

ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

At the October term, 1868, of the district court of Webster county, Iowa, the Iowa Homestead Company, assignor of defendant in error, an Iowa corporation, commenced a suit against the Des Moines Navigation & Railroad Company, another Iowa corporation, and numerous grantees of the latter, including plaintiff in error, to establish title in said homestead company to the so-called "Des Moines river lands," and with a view to alternative relief, in the event of an adverse decree on the question of title, made the following allegation in its petition:

> The said plaintiffs have been in possession of the lands claimed by them, themselves or their grantors in contract, *since 1861*. They have paid the taxes thereon to the state of Iowa *since*, in all amounting to eighty thousand dollars, and if their title has failed, they are entitled to have their taxes refunded *since 1861*, by the holder of the legal title who has not paid them. (Fol. 35.)

And prayed—

That in the event of a decree that the plaintiff's present title or any part of it has failed, the said Des Moines Navigation & Railroad Company and its assigns may be decreed to repay the plaintiff all the taxes which he has paid on said land and interest thereon. (36.)

The answer to this part of the petition is as follows:

As to whether or not the said complainant and its vendees have been in possession of and paid said taxes on the lands claimed by them since 1861, to the amount of eighty thousand dollars, this defendant is ignorant and uninformed save by the said complainant's said bill of complaint, but expressly avers that the possession of the said lands by the said complainant and its vendees since 1861, is and has been unauthorized and wrongful. (38.)

The petition also contained the following allegation:

The said navigation company conveyed certain parcels of the land now claimed by plaintiff to the following persons, among others: Samuel G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, W. J. McAlpine, Richard B. Chapman, Albert Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade and *John Stryker*. (35.)

The suit was commenced in the district court of Webster county, Iowa, and was thence transferred to the circuit court of the United States for Iowa. At the final hearing in the circuit court the petition was dismissed. On appeal to this court, the decision below was affirmed, and the right to recover the taxes paid was denied.

On the question of the complainant's right to the alternative relief claimed, this court, in *Homestead Company vs. Valley Railroad*, 17 Wall., p. 167, said:

It is true, in accordance with our decision, that the taxes on these lands were the debt of the defendants, which they should have paid, but their refusal or neglect to do this did not authorize a contestant of their title to make them its debtor by stepping in and paying the taxes for them without being requested so to do. Nor can a request be implied in the relation which the parties sustained to each other. There is nothing to take the case out of the well established rule as to voluntary payments. If the appellants, owing to their too great confidence in their title have risked too much, it is their misfortune; but they are not, on that account, entitled to have the taxes voluntarily paid refunded by the successful party in this suit.

In the two cases of the *Dubuque & Sioux City Railroad Co. vs. the Supervisors of Webster county, Iowa*, and *Iowa Homestead Co. vs. same*, 40 Iowa, 16, the question was, as to the right of recovery of these identical taxes, by the assignor of defendant in error, from Webster county, and it was held that such recovery could not be had, for the reason stated in the following extracts from the opinion:

> The payments having been made *voluntarily*, with knowledge of all the facts, believing that under the law, the lands belonged to the plaintiffs; the mistake was one of law, and no action at the common law or in equity lies to recover the money thus paid. Page 17.

It will thus be seen that the sole ground upon which the right of recovery was denied, was, that the payment of the taxes had been voluntary.

In *Garrigan vs. Knight*, 47 Iowa, 525, it was held that —

> When the title to real estate is in controversy, and the taxes thereon are voluntarily paid by one of the parties to the controversy, whose claim is afterwards adjudged to be invalid, he cannot recover the amount so paid from the owner.

The decision in this case has never been overruled otherwise than, by being in conflict with later decisions in the numerous "Goodnow cases," of which the case at bar is one.

In the first of these, the case of *Goodnow vs. Moulton*, 51 Ia., 555, prosecuted by Goodnow as assignee of the homestead company for the recovery of part of these same taxes, the defense of voluntary payment having been relied upon, and the case of *Homestead Company vs. Valley Railroad* having been cited as authority, the Supreme Court of Iowa, very strangely overlooking the above quoted paragraph of the opinion in that case, say, in their opinion, page 560:

> We have looked in vain for anything in the statement of the questions involved or the opinion of the court, which tends to show with any degree of certainty, that the right of the plaintiff to recover the taxes paid was in the case.

And more strangely still, in the subsequent case of *Goodnow vs. Stryker*, 62 Iowa, 223, being another case against plaintiff

in error, and now also pending here, after having discovered the oversight in the Moulton case, it is said :

> Since the decision in *Goodnow vs. Moulton*, we cannot follow the decision in *Iowa Homestead Company vs. Des Moines Navigation & Railroad Company*.

The question of voluntary payment having been thus disposed of, it became necessary in the same case, to dispose of the further defense relied on, that the claim was barred by the New York statute of limitations, and this involved the real and decisive question, *when* and *how* did the cause of action accrue, which the opinion thus discusses and determines.

> We do not think a cause of action accrued upon each payment at the time it was made, nor upon all at the time the last one was made. The implied promise upon which the action is based, arose by reason of the circumstances. See *Goodnow vs. Moulton*, above cited. One very important circumstance was that the title was involved in serious litigation which was not terminated in the defendant's favor *until 1873*. We do not think the defendant's implied promise could be regarded as absolute. He certainly never promised to pay these taxes in case the title should be adjudicated to be in the Iowa Homestead Company, and no one had any reason to suppose he intended to incur any such liability. The most that can be said then in regard to the defendant's implied promise is, that it was based upon a contingency, and being so, it was not enforcible until the contingency had happened. We think that the cause of action did not arise until the termination of the litigation by which the title was adjudged to be in the defendant.

Plaintiff in error, accepting this as settling the proposition that a cause of action accrued to the homestead company by "the termination of the litigation by which the title was adjudicated to be in the defendant," the Des Moines Navigation & Railroad Company, plead as one of his defenses in this case, the New York statute of limitations (8), of which state he was a citizen, relying on the decisions of this court in the cases of *Wolcott vs. The Des Moines Company*, and *The Des Moines Company vs. Burr*, 5 Wall., 681 and 689, decided *in 1866*, as being *such termination of that litigation.*

Defendant in error in his original petition based his claim upon an assumed implied promise resulting from the payment

of the taxes by the assignor, the Iowa homestead company, as they from year to year became due, under claim and belief of ownership by it of the lands on which they were paid.

Webster county by some means becoming or assuming to be a party to the suit, filed a pleading in which it alleged that Stryker had never paid the taxes, and that they were due from him to the county. By his answer to Goodnow's petition, Stryker made general denial, and, among other defenses, plead the Iowa and New York statutes of limitation, former adjudication, and the *voluntary* payment of the taxes by Goodnow's assignor. His answer to the pleading of the county, contained the following:

PAR. 3. Said defendant, further answering, says that all of said taxes mentioned in said petition were duly paid by said Iowa Homestead Company as soon as the same became due, and said defendant is no longer liable therefor.

The cause having on a first appeal to the supreme court been reversed and remanded to the lower court for another trial, Stryker was permitted to amend his former answer, which he did, by pleading the former adjudication and repeating his former plea of the statute of limitations of New York. There was no allegation of any *new* promise express or implied, in any plea filed either by Goodnow or Webster county, and the only reply by Goodnow to the plea of former adjudication was that the judgment was void because the courts of the United States had no jurisdiction of the suit in which the adjudication was had; in addition to which he had the benefit of a denial by force of the Iowa statute. Upon this state of the record the supreme court of Iowa says in its opinion that neither the former adjudication nor the bar of the statute of limitations could avail as a defense, because of an assumed new promise, contained in the above quoted paragraph of the answer to the pleading of Webster county, and made therefore, if it can, in any sense, be said to have been made, *after the suit was commenced.*

The following is the certificate which, together with the foregoing, will constitute a sufficient statement of the case and will

show how the questions to be made in argument have become vital in this case by reason of the previous decisions of the supreme court of Iowa in other similar cases, and why plaintiff in error is not unreasonably desirous of having his rights adjudicated in this court, if there is any ground on which he has the right to prosecute his writ of error here.

CERTIFICATE.

And now on the application of the defendant, John Stryker, it is certified by the court here, and ordered to be made part of the record herein, that by the answer of defendant, in defendant's assignment of errors in the additional abstract, and on the hearing in said cause, the defendant claimed immunity from the entire demand and claim of plaintiff, on the ground that, as he claimed, the same demand and claim had been adjudicated against plaintiff's assignor, the Iowa Homestead Company, by the Supreme Court of the United States, in the case of *The Iowa Homestead Company vs. The Des Moines Navigation and Railroad Company*, this defendant and others, at the October term thereof, A. D. 1872, and that our decision herein was and is against the immunity so claimed by defendant.

And it is further certified and ordered to be made part of the record herein, that by defendant's answer and on the hearing in said cause, defendant claimed immunity from said entire claim and demand, because, as was claimed, the alleged cause of action not having accrued within six years immediately preceding the commencement of the action, was barred by the New York statute of limitations, and that to determine whether or not it was so barred, it became material and necessary to decide whether or not the decision of the Supreme Court of the United States, in the case of *Samuel G. Wolcott vs. The Des Moines Navigation & Railroad Company*, was a final determination of the question therein decided, in order to determine when the plaintiff's cause of action accrued, and that our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed because of our said decision that said determination was not final.

ASSIGNMENT OF ERRORS.

Said supreme court of the state of Iowa erred,—

I. In holding that defendant in error is not estopped from prosecuting his cause of action herein by the judgment of the supreme court of the United States in the case of the *Homestead*

Company vs. Valley Railroad, 17 Wallace, 153, and thereby denying the immunity claimed by plaintiff in error by reason of that judgment, under his defense of former adjudication.

II. In deciding the meaning and effect of the decision of the supreme court of the United States in the case of *Wolcott vs. Des Moines Company*, 5 Wallace, 681, to be such as to defeat the defense of the New York statute of limitations, plead by plaintiff in error as a defense to the action, and thereby denying the immunity claimed by plaintiff in error under said decision, upon the true meaning and effect of which said supreme court of Iowa found and held said defense to depend.

ARGUMENT.

It is claimed that the record presents two federal questions, either decided or the decision of which was necessary to the decree rendered by the supreme court of Iowa, the first of which was erroneously decided against the plaintiff in error, and the second of which was either also erroneously decided against him, or its decision was wrongfully and erroneously evaded. As to each, the question whether or not it is a *federal* question, so involves the question whether or not the decision was or was not erroneous, that the same argument will apply to both.

First.—Whether or not the plaintiff in error was entitled to immunity from the demand of the defendant in error, *under the decision and judgment of this court* in the case of *Homestead Company vs. Valley Railroad*, 17 Wall., 153, the controversy therein having been, as plaintiff in error claims, and, as is alleged in his answer, between the same parties, and upon the same issue, and for the same demand, and the decision and judgment therein having been against the validity of such demand.

Second.—The plaintiff in error claimed immunity from the demand of the defendant in error, because *by force and virtue of the decision of this court* in the case of *Wolcott vs. Des Moines Company*, 5 Wall., 681, and the *Des Moines Company*

vs. Burr, *Id.*, 689, the cause of action accured, if ever, at the date of said decision, and was, therefore, at the commencement of this suit, barred by the statute of limitations of the state of New York.

The decision of this question, and the necessity therefor, by the supreme court of Iowa, are thus stated in the certificate:

> To determine whether or not it was so barred, it became necessary to decide whether or not the decision of the supreme court of the United States in the case of *Samuel G. Wolcott against the Des Moines Navigation and Railroad Company was a final determination of the question therein decided.* * * * And our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed *because of our said decision that said determination was not final.*

I.

Was the question whether or not defendant in error was estopped by the judgment of the court in the case of the *Homestead Company vs. Valley Railroad*, a federal question, and, if so, was it erroneously decided?

It is not denied that the plea of former adjudication was a claim of immunity under an authority exercised under the United States, and raised a federal question, but it is insisted that the decision was not a decision against the immunity so claimed, and that such a decision was not necessary to the decree rendered, for the reason that, as is maintained, there was another issue in the case upon which the decision might be and was made, and upon which the decree can be maintained regardless of the federal question.

Whether or not this position is maintainable involves the question: *First.*—Whether or not the decision was in fact against the immunity claimed; and, if not, then, *Second*—whether or not such a decision was "necessary to the judgment or decree rendered in the case;" or, in other words, whether or not there

was any other question in the case rendering the decision of that question unnecessary.

First.—Was the decision against the immunity claimed?

The opinion very clearly indicates that the decision in the case involved the question, whether or not the act of claiming the benefit, *after* the adjudication, in *Homestead Company vs. Valley Railroad*, *supra*, of the payments, made *before* that adjudication, could on some principle of relation and ratification be made to obviate the effect of the adjudication. In other words, whether or not the ingeniously contrived new implied promise could be supported by a consideration that had already been adjudged insufficient to create a liability.

The following is the portion of the opinion referred to:

> The case before us is peculiar. The act done was such that it necessarily inured to the defendant's sole benefit. Besides, the circumstances under which the act was done should not be overlooked. The defendant neglected the payment of the taxes, which was a duty of public concern. He allowed the plaintiff's assignor, under an honest claim of title to the land, to discharge this duty for several years in succession. Now, while the plaintiff is not allowed, *by reason of prior adjudication*, to set up these facts *as alone sufficient to create a liability on the part of defendant*, they may be considered, we think, *in connection with the fact that the defendant has since claimed the benefit of the payments* as sufficient to render such claim of benefit, a ratification, if it otherwise would not be.

It is very clear from this language that the question of the effect of the former adjudication was at least involved in the decision, and that was all that was necessary to give this court jurisdiction.

In *Mackay vs. Dillon*, 4 Howard, 421, it is said, on page 447, that when "it is sought to give effect to evidence for purposes which involve questions giving this court jurisdiction, then the decisions of state courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed, in a similar manner as if a like question had arisen in a supreme court of error of a state when reviewing the proceedings of inferior courts of original jurisdiction."

And in *Kennedy's Executors vs. Hunt's Lessee*, 7 Howard, 586, involving a congressional grant, and the question being as to whether or not a ruling of the state court rejecting evidence of a certain survey of the grant raised a federal question, the court, on page 594, held that it did not, for the reason that "it could not change the grant nor affect its validity in any degree."

What the supreme court of Iowa must necessarily have considered and passed upon was, whether or not the assumed moral obligation was sufficient consideration to raise and support an implied promise to pay an assumed debt, not only barred by the statute of limitations, but that had been already adjudged by this court *not to be a debt;* and in doing so it necessarily decided against the immunity claimed under the prior adjudication, by holding the alleged new promise to have deprived that adjudication of what must otherwise have been its "force and effect."

That such was the view of the state court is further made evident by its certificate which, as to this question, concludes with the words, "our *decision* herein *was and is against the immunity so claimed* by defendant." It is difficult to see why this explicit statement by the court should not be taken as conclusive.

Second.—Was there any other question upon which the case might have been decided, as it was decided, without regard to the federal question? The only question or ground upon which it is claimed that it might have been, and in fact was so decided, is that of the alleged new promise.

As already shown, this, had it really been an issue in the case, was so related to the question of former adjudication as necessarily to involve the latter question in the decision. *But that issue was not in the case.* The so-called new promise was made *after the commencement of the action*, and was not plead by Goodnow, either by way of amendment of his petition, or in his reply, *or in any pleading in the case.*

The court quite unwarrantably in the first paragraph of the

opinion, assumes that a *new* implied promise was plead by Goodnow in reply to the plea of former adjudication, using this language :

> The defendant pleaded as one of its additional defenses that the plaintiff's right of recovery is barred by a prior adjudication, to-wit : An adjudication in the case of the *Iowa Homestead Company vs. Des Moines Navigation & Railroad Company*, reported in 17 Wall., 153. To this plea the plaintiff replies, in substance, that if it should be conceded that the court made an adjudication in that case, denying a right of recovery for the taxes in question in this case, yet this action is not barred because a right of recovery has arisen since that time. The fact relied upon as giving such right of recovery is that the defendant now claims, as he did not then, the benefit of the payments made by the homestead company.

The fact is, as can be seen by reference to the record, that plaintiff did nothing of the kind. *There is not a line or syllable anywhere in the record showing that any such reply or the semblance of it was filed.*

Suppose in a case in which a federal question is clearly and properly presented for decision, and there is no other question in the case rendering its decision unnecessary, the state court should, through oversight or for any other reason, say : "The question not being necessarily before us for decision, we do not decide it." Will a party thus denied the immunity he claims be thereby deprived of right to come for redress to this court? If not, let it be further supposed that the state court is *mistaken* in assuming that there is another question, not federal, rendering the decision of a question conceded to be such, unnecessary, is this court to be affected in its jurisdiction by the mistake of the state court, or must it determine the question of its jurisdiction on its own understanding of the record ?

It will not be disputed that the question of the right of the plaintiff in error to the immunity claimed, was properly raised and presented for decision, nor will it be questioned that *at the commencement of this suit* his right to the immunity claimed was complete and absolute *by virtue of a judgment of this court.* The state court decided that he lost or deprived himself of that

right, by claiming, *not as between Goodnow and himself*, but, *as against Webster county only*, the benefit of the payment made by the homestead company. Unless the judgments of this court can be made the sport of state courts, that is a question that may be also decided here. The judgment under which immunity is claimed is still the judgment, unreversed and in full force, of this court, and the question is whether it is still a protection to the party in whose favor it was rendered. It certainly should be if that decision of the state court was erroneous; and surely this court will not allow its own judgments to be *nullified* by the erroneous decisions of state courts upon *any kind* of question. Whether or not the decision in question was erroneous we are content to submit on what has already been said.

But conceding, for the purpose of argument only, that this court has not the right to review the decision of such a question by the state court, when properly raised and presented for its decision, there is still a ground on which its jurisdiction can be maintained.

The question by the decision of which it is claimed the question of former adjudication was disposed of, was not, as already suggested, an issue in the case, and was, in no legitimate manner, raised or presented for decision by the court. Goodnow having made no claim of exemption from that adjudication on the ground relied upon by the court, the decision was outside the case, wholly gratuitous, and, with all due respect to the supreme court of Iowa, was therefore, in fact if not in intent, a mere evasion of the question of former adjudication, and left that question, the decision of which was clearly necessary to the judgment rendered, as if it had not in fact been in any manner passed upon. That this court would in such a case have jurisdiction is a proposition, sound in principle, and well sustained by authority. It was clearly the purpose of the act of congress to secure to a litigant, whose rights depend on questions of federal

law, the right to have all such questions decided by this, the highest federal tribunal, whenever, on proper presentation, he has been unable to get a favorable decision in the state tribunal. This right is no less valuable because of being simply *ignored* or *evaded*. In the case of an adverse judgment, it can make no difference to a party deprived of a right by what means he is deprived of it.

In the opinion in *Crowell vs. Randall*, 10 Pet., 368, in which it is perhaps more explicitly stated than in any other case that an actual decision of the federal question is necessary to give this court jurisdiction, the previous cases, in which the question had arisen, were carefully reviewed; and they not only do not sustain the position that there must be an actual decision, in the sense of expressly, or in terms, passing on the question, but do sustain the contrary position, that it is sufficient to give jurisdiction, if a federal question, essential to the decision of the case, is properly before the court for decision. In *Miller vs. Nicholls*, 4 Wheaton, 311, referred to in that opinion on page 393, jurisdiction was denied for the reason that the insolvency of Nicholls, upon which the federal question depended, did not appear. The court in its review of the case say:

> But it did not appear in the statement of facts that Nicholls was then in a state of insolvency, and if he was not, then the priority of the United States did not attach or, in other words, the act of congress was not applicable to it. It is to this state of the facts that the language of the chief justice—Marshall—was addressed. He—the chief justice—added: 'had the fact of insolvency appeared upon the record that would have enabled this court to revise the judgment of the supreme court of Pennsylvania. And why, it may be asked. Because upon the statement of facts the state court must, under these circumstances, have misconstrued the act of congress *or disregarded* it; for otherwise they would not have given the judgment which was sought to be revised.'

Following this are quotations from the opinions in other cases as follows:

From the opinion in *Hickie vs. Starke*, 1 Pet., 98, quoted on page 395:

But it has always been deemed essential to the exercise of jurisdiction in such a case that the record should show a complete title under the treaty or act of congress and that *the judgment* of the court is *in violation* of that treaty.

From *Wilson vs. Blackbird Creek Marsh Company*, 2 Pet., 245, quoted also on page 395 —

It is sufficient to bring the case within the provision of the twenty-fifth section of the judiciary act, if the record shows that the constitution or a law or a treaty of the United States must have been misconstrued or the decision could not have been made, or, as in this case, that the constitutionality of a state law was questioned and the decision was in favor of the party claiming under such law.

From *Craig vs. State of Missouri*, 4 Pet., 410, quoted on page 396 :

It is sufficient if the record shows, that the constitution, or a treaty or law of the United States *must have been construed* or that the constitutionality of the state law *must have been questioned*, and the decision has been in favor of the party claiming under such law.

On page 395, the following reference in *Williams vs. Norris*, 12 Wheaton, 117, to *Miller vs. Nicholls*, is quoted :

Had the record shown that this was a case of insolvency so that the act of congress applied to it, that act *must have been* misconstrued, or its obligation denied, when the court decreed the money to Pennsylvania, and the court were of opinion that the act *could not be evaded* by the omission to refer to it in the judgment or to spread it on the record.

In *Williams vs. Bruffy*, 102 U. S., 248, the Virginia court of appeals having denied a supersedeas for the review of a judgment of an inferior court of that state, the judgment sought to be reversed involving a federal question, this court, on error to the court of appeals, maintained the rightfulness of its jurisdiction, and on page 253 used this language :

No doctrine of this court rests upon more solid foundations, or is more fully valued or cherished, than that which sustains its appellate power over state courts where the constitution, laws and treaties of the United States are drawn in question, and their authority is denied *or evaded*.

In *Chicago Life Insurance Co. vs. Needles*, 113 U. S. 574, it was held that—

When the final judgment of a state court involves the adjudication of the claim made therein that a statute of the state is in derrogation of rights secured to a party by the constitution, this court has jurisdiction of the cause in error although the state court did not in terms pass upon the point,

And on page 579 in the opinion it is said:

The supreme court of Illinois did not in terms pass upon the claim distinctly made there as in the court of original jurisdiction that the statutes in question were in derrogation of rights and privileges secured to appellant by the constitution of the United States. But the final judgment necessarily involved an adjudication of that claim, for if the statutes upon the authority of which alone the Auditor of State proceeded are repugnant to the national constitution that judgment could not have properly been rendered. This court therefor has jurisdiction to inquire whether any right or privilege protected by the constitution of the United States has been witheld or denied by the judgment below.

In *Brown vs. Colorado*, 106 U. S., 97, it was said:

Certainly if the judgments of the courts of the states are to be reviewed here on such (federal) questions, it should only be when it appears unmistakably that the court *either knew or ought to have known* that such a question *was involved in the decision to be made.*

In *McManus vs. O'Sullivan et al.*, 91 U. S., 578, it is held as follows:

This court has no jurisdiction to re-examine the judgment of a state court where a federal question was not in fact passed upon, *and where a decision of it was rendered unnecessary in the view which the court below took of the case.*

In *Murdock vs. City of Memphis*, 20 Wallace, 590 it is said in the opinion, page 636:

But if it be found that the issue raised by the question of federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the state court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the federal question, then this court will reverse the judgment of the state court.

In the following, and many other cases, it has been held that to sustain the jurisdiction, it must appear that the federal ques-

tion was actually decided, "*or that its decision was necessary to the judgment or decree in the case.*"

Chanteau vs. Gibson, 111 U. S., 200.
Murdock vs. City of Memphis, 20 Wall., 636.
Detroit Railway Co. vs. Gothard, 114 U. S. 133.

II.

Does the question, whether or not the decision of this court, in the case of *Wolcott vs. Des Moines Company*, 5 Wallace, 681, was a final determination of the question of title, as between the claimants under the railroad and river land grants, respectively, and the decision of the supreme court of Iowa, holding it not to have been, and thereby defeating the defense of the New York statute of limitations, present a federal question, and if so, was the decision of said supreme court of Iowa holding the decision in question not to have been such final determination, erroneous?

Since by the terms of the act of congress the right to the writ of error exists whenever an "immunity is claimed under authority exercised under the United States, and the decision is against the immunity claimed;" and as, in the language of the opinion of this court in *Murdock vs. City of Memphis*, 20 Wall., page 632: "It was no doubt the purpose of congress to secure to every litigant whose rights depended *on any question of federal law*, that the question should be decided for him by the highest federal tribunal"—in the contingency of an adverse decision by the state court—it seems plain enough that this case, on the remaining question, comes within both the terms and purpose of the law. Certain it is, from the certificate, that the claim of immunity under the defense of the statute of limitataions depended absolutely on the effect to be given the former decision of this court in the Wolcott case; and it is equally certain that, had the state court given to the decision in the Wolcott case the effect

claimed for it by the plaintiff in error, the result would have been the immunity claimed.

The question upon which, in the other Stryker case, referred to in the statement, the defense of the statute of limitations turned, was, whether the cause of action accrued at the dates of the respective payments of the taxes, or when the question of title was finally determined by the decision of this court, as between the claimants respectively, under the so-called river land and railroad grants; and, if at the date of the final decision of that question, whether or not the decision in the cases of Wolcott and Burr, 5 Wall., *supra*, was such final determination. How the question assumed that form is shown by the extract from the opinion in the case, copied into the statement.

The court having thus in effect made the question of defendant's liability to depend upon the time of "the termination of the litigation by which the title was adjudicated to be in defendant," the ultimate and precise question as shown by the certificate, as above quoted, upon which the case and defendant's liability turned, was, whether or not the decision of this court in the cases of Wolcott and Burr was a final adjudication of the question of title therein passed upon; in other words, *upon the effect to be given to a decision of this court.* While, in terms and immediately, immunity was claimed under the statute of limitations, yet the ultimate and essential ground upon which the claim must be allowed, if at all, was that, according to the true interpretation and effect of the decision in the cases just named, a cause of action thereby and of that date accrued to the defendant in error.

Can it make any difference how the question of immunity comes to depend on a question of federal law, provided only that it comes legitimately before the court, and does necessarily so depend?

Plaintiff in error maintained that the decision in these cases was a final determination of the question, while the court held

that the question was not finally decided until 1873, meaning in the cases of *Williams vs. Baker*, 17 Wall., 144, and *Homestead Company vs. Valley Railroad*, *Id.*, 153, and, so holding, necessarily held that the action was not barred. From the contrary holding it would have as necessarily followed that the action was barred. There was no question requiring a construction in any respect of the New York statute of limitations, nor was its application to the case dependent upon any controverted fact proposition. The real and only question, therefore, was, whether or not the decision of this court in the Wolcott and Burr cases was *final* in such sense as that, according to the rule or doctrine laid down by the supreme court of Iowa, a cause of action then accrued. That decision was made in cases to which, by intervention, the assignor of defendant in error was a party, as will be seen by reference to the record (68–78). That the homestead company must be treated as having been a party to the Wolcott and Burr cases for the purposes of this question, is further evident from the following taken from the opinion of this court in *Williams vs. Baker*, 17 Wall., 144, referring to a complaint of collusion between the parties in the Wolcott and Burr cases, and the claim that for that reason it should not be treated as an authoritative adjudication. On pages 150–2, the court says:

> We must be permitted to question both the taste and legal competency of testimony offered in an inferior court to show that a decision in this court was obtained by fraudulent devices, *when that decision is not relied on as evidence of any fact or pleaded as an estoppel, but merely because it may be referred to as settling a principle of law applicable to the case at bar.*
>
> There is in the record of that case, as it remains in this court, sufficient answer to this objection to the opinion *as an authority on the law in this case.* The writer of this opinion, though then a member of the court, declined to take any part in its decision because he had been of counsel for the navigation company in a general way, and did not know how far he might have been engaged in that case. But when it was submitted on printed arguments on both sides he saw at once that the legal propositions involved did affect materially the title of several railroad companies in Iowa to the lands in question, and he felt it to be his duty to call the atten-

tion of those of his brethren who must decide the case to that fact. On this suggestion an order was made that those companies be notified of the pendency of that suit, with liberty to intervene and be heard on the question in which they were interested. They did intervene, the case was postponed for over a year, and several arguments were submitted in favor of the railroad companies by able counsel *on the very question now under consideration*, and an order was made inviting all parties interested to do so. It was after a full consideration of all these arguments that the decision was made. But there was an additional security that the court would carefully consider the question, in the fact that there was submitted at the same time the case of *Burr vs. the Des Moines Navigation & Railroad Company*, on a similar warranty of title. Now, though both suits were decided in the circuit court for the southern district of New York, they were decided by different judges, and the decisions were in conflict. This of itself would demand of the court a careful consideration of the point of difference which was the very point now under consideration. * * *

Whatever, therefore, may have been the design of the original parties to the suit of *Wolcott vs. the Des Moines Company*, it is clear that the question here involved was argued fully by parties deeply interested on both sides, and received the attentive consideration of the court, and as an authoritative exposition of its views is entitled to the same weight as other well considered cases.

Further and conclusive evidence that the question for decision, and the land, the title to which was in controversy, was the same in the two cases will be found by a comparison of descriptions and a reference to the charge of Judge Shipman to the jury in the Burr case, and the argument of Platt Smith on behalf of the Dubuque & Sioux City R. R. Co. intervenor, in the Wolcott case. The identity of the lands will be seen from the description of those involved in the homestead company case (37) embracing all of the *odd* numbered sections in townships 88 and 89 north, of range 27 and 28 west, and all of the lands involved in the Wolcott and Burr cases (37 and 61) being in *odd* numbered sections, in these *same* townships and ranges; while the identity of the questions is clearly shown by the charge of Judge Shipman (65–7), and the argument of Platt Smith (80–6).

The Wolcott-Burr decision has repeatedly been reaffirmed, and

the court in *Homestead Company vs. Valley Railroad*, 17 Wall., on page 162, thus refers to it:

> The main question involved in this case is the question of the title to the Des Moines river lands, which was *settled* several years ago by the decision in the cases of Wolcott and Burr, and in the subsequent unreported case of *Riley vs. Wells*, adversely to the titles set up by the appellants. At the present term of this court the principles involved in these decisions have been reconsidered and reaffirmed.

In *Litchfield vs. the County of Webster*, 101 U. S., it is said on page 777, referring to the conflicting claims under the railroad and riverland grants, respectively, and to the fact of the lands having been claimed by the state under the former grant, it is said:

> This claim on the part of the state was maintained and constantly asserted adversly to Litchfield, until the case of *Wolcott vs. Des Moines Company*, 5 Wallace, 681, was decided in this court at the December term, 1866. *That decision settled the dispute as to these lands.*

Is the decision of the state court as to the proper interpretation and effect of the decision of this court, in *Homestead Company vs. Valley Railroad*, a "federal question" within the meaning of the act of congress.

It is respectfully submitted that upon this point the case is within the principle of the following decisions of this court: *Dupasseur vs. Rochereau*, 21 Wall., 130, in which on error to the supreme court of Louisiana, this court took and exercised jurisdiction to determine whether or not, upon a question of the order of priority of liens, the decree of the state court foreclosing a mortgage, accorded due force and effect to a decree previously rendered in the United States circuit court for that state foreclosing another mortgage on the same premises; and *Embry us. Palmer*, 2 Supreme Court Reporter, 25, in which it was held that this court might, on error, review the judgment of the Supreme Court of Connecticut enjoining the collection of a judgment rendered by the Supreme Court of the District of Columbia.

The decree of the federal court—which it was claimed in the first named case had not been given its due legal effect—it will be observed, was rendered in a case to which Rochereau, against whom the question was made, was not a party. Yet this court took jurisdiction and affirmed the decision of the state court *because it had given due effect to the decision of the federal court.* The state court could not have certified more certainly than it has in the case at bar that its decision was against the immunity claimed *because of the limited effect allowed by it to the Wolcott decision.* Suppose the defense of the statute of limitations, the case in all other respects being the same, had, instead of turning upon a decision of this court, turned upon the meaning and effect to be given to an act of congress, would the question in legal effect have been different? And yet is it not clear that it would have been a federal question.

Crescent Live Stock Co. vs. Butchers' Union, 120 U. S., 143, holds as follows:

> The judgments and decrees of the circuit court of the United States setting in a particular state are to be accorded in the courts of that state, whether as the foundation of an action or of a defense, either by plea, or in proof such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority; and whether such due effect has been given by such court to a judgment or decree of court of the United States, is a federal question within the jurisdiction of this court on a writ of error to the supreme court of the state.

In the opinion on page 146, it is said;

> It is argued by counsel for the defendant in error that this does not embrace any federal question that the effect to be given to a judgment or a decree of the supreme court of the United States sitting in Louisiana by the courts of that state is to be determined by the law of Louisiana or by some principle of general law as to which the decision of the state court is final, and that the ruling in question did not deprive the plaintiff in error of any privilege or immunity specially set up or claimed under the constitution or laws of the United States. But this is an error. The question whether a state court has given due effect to a judgment of the court of the United States, is a question arising under the constitution and laws of the United States, and comes within the jurisdiction of the federal courts by proper process.

In *Factors & Traders Insurance Company vs. Murphy*, 111 U. S., 738, it was held, that this court had jurisdiction because the controversy in the case related to the effect to be given to a sale under an order of the district court of the United States.

While in terms the certificate states the question to have been whether or not the decision in the Wolcott case was a *final* decision of the question of title, it is obvious that it could only have been, whether or not upon the theory of that court as to the nature of the implied promise and the condition upon which a suit could be brought, it was such a decision of the question as gave to the defendant in error an immediate right of action upon it.

The defendant in error having been a party in such sense and manner as to be concluded by the adjudication, the decision was necessarily final, unless and until in some manner reviewed and set aside by this court, of which having been done there is no pretense. The supreme court of Iowa must therefore necessarily have held that the question of title was not one of the questions decided in the Walcott and Burr cases, as otherwise it must necessarily have held a cause of action to have then accrued and to have been barred long before the commencement of this suit. The question therefore in reality was, whether or not the question of title was decided, and not as to its being or not being final. How long must the defendant in error have waited to find out whether or not the decision was final and give it a right of action? Was it to wait until the commencement of another action, and if such action had never been commenced would the decision have never become final?

C. H. GATCH AND
WILLIAM CONNOR,
Attorneys for Plaintiff in Error.

No. 42

Supreme Court of the United States.

OCTOBER TERM, 1887.

JOHN STRYKER,
Plaintiff in Error,
vs.
GEORGE CRANE, Adm'r,
Defendant in Error.

On Error from Supreme Court of Iowa.

Brief of Defendant in Error.

C. H. GATCH, for Plaintiff in Error.
GEORGE CRANE, for Defendant in Error.

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C. H. GATCH, for Plaintiff in Error.
GEORGE CRANE, for Defendant in Error.

STATEMENT.

During the years 1860 to 1873, the title to about fifty thousand acres of lands situated in Webster county, Iowa, and known as the "DesMoines river lands," was in dispute between different claimants thereto. The Dubuque & Sioux City Railroad Company and its grantee, the Iowa Homestead Company, claimed title under the act of Congress approved May 15, 1856, granting lands to the state of Iowa to aid in the construction of certain railroads in that state. The DesMoines Navigation & Railroad Company and its grantees claimed title under an act of Congress approved Aug. 8, 1846, granting lands on each side of the DesMoines river to the territory of Iowa to aid in the improvement of the navigation of said river; also under a joint resolution of the two houses of Congress, approved March 2, 1861, relinquishing the interests of the United States to the *bona fide* purchasers of said lands from the state of Iowa, and a further act of Congress approved July 12, 1862. The plaintiff in error is one of the grantees of the DesMoines Navigation & Railroad Company, and a *bona fide* purchaser of a portion of the lands from the state of Iowa.

While the controversy about the title was going on, and up to the year 1864, the Dubuque & Sioux City Railroad Company, the defeated party in the litigation, paid the taxes which were assessed upon the lands in controversy. Prior to the commencement of the case at bar, said railroad company assigned and transferred its right to recover the taxes so paid, to Goodnow the defendant in error. Under the law of Iowa it is claimed that the railroad company having paid all taxes in good faith, and under a belief of ownership, had the right to recover them back from the parties who succeeded in establishing their ownership of the lands. The state court sustained this claim of right to recover the taxes.

The defenses relied upon in this court are based upon the following facts. In November, 1863, the Dubuque & Sioux City Railroad company, by deed of general warranty, sold and conveyed all its right and title to said lands to the Iowa Homestead company, a corporation organized under the laws of Iowa.

In the year 1868, the Homestead company commenced a suit in the district court of Webster county, Iowa, against the Des-Moines Navigation & Railroad company and its grantees, including the plaintiff in error, for the purpose primarily of determining the title to the lands claimed under the conflicting grants heretofore mentioned. In addition to asking to have its title to the lands established, the Homestead company prayed in case of failure to obtain such title, to have judgment against each of the defendants for the taxes which it had paid on the lands during the controversy about the ownership thereof. In the same year the cause was transferred from the state district court to the circuit court of the United States for the district of Iowa. The petition for removal, which was under the removal act of 1867, was filed by only three of the thirteen defendants to the suit. Record By order of the state court the cause was removed as to all of the defendants. Record

The bill in the suit of the Homestead company against the Navigation Company contained the following allegations:

> The petition of the Iowa Homestead Company shows that said company is a corporation duly *created by the laws and a citizen of Iowa.*

Of these lands the fifty thousand acres lying east of the Des-Moines river are claimed by the DesMoines Navigation and Railroad company, *a corporation created by the laws of Iowa*, and its assigns.

After the settlement of the state with the DesMoines Navigation Company in 1858, the said Navigation company conveyed certain parcels of the land now claimed by plaintiff to the fol-

lowing persons among others: Samuel G. Wolcott, Wm. B. Welles, Roswell S. Burrows, Edwin C. Litchfield, W. J. McAlpine, Richard B. Chapman, Albert Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade and John Stryker.

As to the taxes the petition contained the following clauses, to-wit: Record 15 & 16

The said plaintiffs have been in possession of the lands claimed by them, themselves or their vendors in contract since 1861. They have paid taxes thereon to the state of Iowa since in all amounting to eighty thousand dollars, and if their title has failed they are entitled to have their taxes refunded since 1861 by the holder of the legal title who has not paid them."

The prayer of the petition contained the following:

The plaintiff prays that in the event of a decree that the plaintiff's present title or any part of it has failed that the said Des Moines Navigation & Railroad Company and its assigns may be decreed to repay to plaintiff all the taxes which he has paid on said lands and interest thereon.

On the 2nd of August, 1869, the Navigation Company and the other defendants filed a joint answer denying the claim of title set up in the petition. Record 17

STIPULATION TO SUBMIT.

May 13, 1871, there was filed in the Circuit Court of the United States a stipulation between the parties in the said Homestead suit in the words and figures following: Record 19

It is agreed that the *only* questions submitted on the hearing are:

1st. In which of the parties is the paramout title to the lands in controversy?

2nd. If the title shall be adjudged to be in the defendant, the Des Moines Navigation & Railroad Company, is the plaintiff entitled to be re-embursed the taxes which it has paid on the lands.

The defendants all answered and insisted that the DesMoines Navigation & Railroad Company had received a valid title to the lands in dispute.

DECREE.

On the 31st of May, 1871, the Circuit Court of the United

States rendered its decree in the words and figures following:

Record 26

This cause came on to be heard at the May term, 1871, of said court, Grant & Smith for the plaintiff, and Ellwood, Nourse & Withrow for the Des-Moines Navigation & Railroad Company and purchasers, and Withrow & Strong for the DesMoines Valley Railroad co'y. And the cause is heard upon the bill and amendments, answers, replications, agreements of counsel, exhibits and depositions.

And thereupon it was ordered adjudged and decreed that the plaintiff's bill *as to the lands* in Townships 86, 87, and 88, Ranges 27, 28, 29 and 30 east and west of the Des Moines river and south of the second correction line and Townships 89, 90, 91, and 92, Ranges 28 and 29 east of the Des Moines river, and the bill for relief for indemnity lands in lieu thereof be dismissed.

And the bill for relief *as to the lands* in Townships 89 and 90 north Range 28 and 29 west on the west side of Des Moines river be dismissed without prejudice and the plaintiff pay the costs."

DECREE IN THIS COURT.

On the 28th of April, 1873, this court entered the following decree in said cause:

On consideration whereof it is now here ordered, adiudged and decreed by this court that the decree of the said Circuit Court in this cause be and the same is hereby affirmed with costs."

CERTIFICATE.

And now on the application of the defendant, John Stryker, it is certified by the court here, and ordered to be made part of the record herein, that $479 of the amount herein found and adjudged to be due from defendant to plaintiff, was so found and adjudged as and for the amount paid by plaintiff's assignor, as and for taxes for the year 1861 on lands in the petition described; that said lands are part of the so called DesMoines river land, granted by the United States to the state of Iowa by act of Congress of August 8, 1846, entitled, "an act granting certain lands to the territory of Iowa to aid in the improvement of the navigation of the DesMoines river in said territory." The joint resolution of Congress of March 2, 1861, entitled "a joint re-

solution to grant title to lands in the state of Iowa," and the act of Congress of July 12, 1862, entitled "an act confirming a land claim in the state of Iowa and for other purposes," and that all of said lands are located above the Raccoon fork of said Des Moines river. That the validity of said taxes and the levy thereof for the year 1861 was drawn in question therein by the defendant Stryker on the ground, as maintained by him, that the lands were public lands of the United States at least until March 2, 1861, and if so, were not under the law of Iowa taxable until the year 1862. And this court decided herein that said lands were subject to taxation by the state of Iowa for the year 1861, and that said sum of $479 was recoverable of defendant by plaintiff because the same were so subject to taxation for that year.

And it is further certified and ordered to be made a part of the record herein that by his answer, and on the hearing in said cause the defendant claimed immunity for the entire demand and claim of the plaintiff on the ground that, as he claimed, the same demand and claim had been adjudicated against plaintiff's assignor, the Dubuque & Sioux City Railroad Company by the Supreme Court of the United States in the case of the Iowa Homestead Company vs. the DesMoines Navigation & Railroad Company, this defendant and others at the October Term thereof, A. D. 1872, which case was as defendant claimed and maintained in this court prosecuted by said Dubuque & Sioux City Railroad Company for its own use and benefit in the name of said Homestead Company, and the plaintiff's assignor was therefore in such sense a party to said suit as to be bound and concluded herein by said adjudication therein, and that our decision herein was and is against the immunity so claimed by defendant.

Section 711 of the Revision of 1860 provides that:

> Government lands entered or located, or lands purchased from the state shall not be taxed for the year in which the entry, location or purchase is made.

Section 712 declares: That all other property real and personal within the state is subject to taxation in the manner directed.

The Code of Iowa provides as to the duties of the clerk of the Supreme Court as follows:

Section 146. The office of the clerk of the Supreme Court shall be kept at the seat of government, and he shall keep a complete record of all proceedings of the court.

Section 149. He shall record every opinion rendered by the court as soon as filed.

ARGUMENT.

There are two points legitimately arising in this case, which, if decided in favor of the defendant in error will determine or dispose of all the Goodnow cases now pending in this court.

The first is that the decree rendered by the circuit court of the United States in the Homestead suit was null and void for want of jurisdiction.

And the second is that the liability of the lands to taxation after the 2nd of March, 1861, for that year, was in no sense a federal question notwithstanding the legal title remained in the United States till that date.

I

1. We shall discuss these points in the order in which they are stated. As the plaintiff in error claimed immunity from the entire demand by reason of the decree rendered by the circuit court of the United States in the Homestead suit, it became the duty of the state court to inquire into the authority or jurisdiction of that court to render that decree. And no where has this duty been more distinctly or more broadly stated than by this court. Thus in Williamson vs. Berry 8 How. 540 this rule is stated as follows:

It is a well settled rule in jurisprudence that the jurisdiction of *any*

court exercising authority over a subject may be inquired into in *every other* court when the proceedings in the former are relied upon and brought before the latter by a party claiming the bene fit of such procceedings."

Elliot vs. Piersol, 1 Peters 340.
Rose vs. Himely, 4 Cranch 241.
Hickey vs. Stewart, 2 How. 762.
Bloom vs. Bendick, 1 Hill 130.

2. In the Homestead suit the sole and only issue as to the lands that was submitted to, or in any manner passed upon by the court was whether the *Navigation Company had acquired title thereto.* By the pleadings and by the *express terms* of the stipulation submitting the case to the court no other issue could be considered by the court till the title to the lands was validly determined to be in the Navigation Company. The rights of the grantees of the Navigation Company depended exclusively upon the validity of the title of that company. The overthrow of its title would have been the overthrow or defeat of the titles of all the other defendants. It is clear then that according to the settled rules of equity pleading and practice the Homestead Company had a perfect right to join the Navigation Company and all its grantees as defendants in that suit.

Story's Eq. Pleadings, Section 72, 78.
Elmendorf vs. Taylor, 10 Wheation 152.

3. Aside from the question of federal jurisdiction it must be conceded that it was clearly competent for the Homestead Company to test the title to *all* the lands mentioned in its petition in a single suit, and that to *such* a suit that company and all its grantees were absolutely necessary and indispensable parties. Indeed the object of the suit could not possibly have been attained without joining as defendants all the parties named.

In Pirie vs. Tevdt, 115 U. S. 41 in a suit to recover damages for malicious prosecution this court stated the rule as to necessary parties as follows:

"It has been decided at this term in Louisville R.R. Co. vs. Ide 114 U. S. 52, that in a suit on a contract brought by a citizen of one state against a citizen of the same state and a citizen of another state, there was no such controversy as would entitle the citizen of the other state to remove the cause even though he answered separately from his to co-defendant setting up a separate defense, and the statutes regulating the practice, pleadings and forms and modes of proceeding in the state where the suit was brought allowed judgments to be given in actions *ex contractu* for one or more plaintiffs and for one or more defendants. In that case it was said: *A defendant has no right to say that an action shall be several which a plaintiff elects to make joint.* Smith vs. Rines, 2 Sumner 348. A separate defense may defeat a joint recovery, but *it cannot deprive a plaintiff of his right to prosecute his own suit to a final determination in his own way.* The cause of action is the subject matter of the controversy, and that is for *all the purposes of the suit whatever the plaintiff declares it to be in his pleadings.*

We are unable to distinguish this case in principle from that. There is here according to the complaint but a single cause of action, and that is the alleged malicious prosecution of the plaintiff by all the defendants acting in concert. The cause of action is several as well as joint, and the plaintiff might have sued such defendants separately or jointly. *It was for the plaintiff to elect what course to pursue.*

Starin vs. New York, 115 U. S. 248.
Crump vs. Thuber, 115 U. S. 56.
Ayers vs. Wiswall, 112 U. S. 187.

So in Shainwald vs. Lewis 108 U. S. 158 the facts were strictly analogous in all essential particulars to the facts in the Homestead suit.. In that case the suit was brought to determine the title to a stock of goods alleged to be the property of a partnership. One of the alleged partners had made an assignment of the goods, and his assignee had sold and delivered a part of them to other persons who were also made defendants to the suit. The title to the stock of goods depended solely upon the question whether there was a partnership or not; if there was, the plaintiff would recover; if there was not, the defendants, including the purchasers, would retain the goods.

This court in substance said:

The defendants deny the existence of the partnership; upon one side of that issue as now made up is the plaintiff a citizen of Nevada, and on

court exercising authority over a subject may be inquired into in *every other* court when the proceedings in the former are relied upon and brought before the latter by a party claiming the bene fit of such procceedings."

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This court in substance said:

The defendants deny the existence of the partnership; upon one side of that issue as now made up is the plaintiff a citizen of Nevada, and on

the other side is Shainwald a citizen of California, and all the other answering defendants citizens of Nevada. If Shainwald is a necessary party so are they because they are interested in the controversy in the same way if not to the same extent that he is. *They got their title from him. The title to all depends on defeating the claim of the plaintiff Lewis as partner.* To that extent their interests are identical with those of Shainwald. If there was no partnership they all go free and each keeps the property he has got.

Neither was there any separable controversy in the suit such as would entitle any of the parties to a removal under the second clause. *The main dispute is about the existence of the partnership. All the other questions in the case are dependent on that.* If the partnership is established the rights of the defendants are to be settled in one way, if not, in another. There is no controversy in the case now which can be separated from that about the partnership and fully determined by itself.

Neither was there any controversy in the Homestead suit that could be separated from the simple question whether the Navigation Company had title to the lands or not. By the pleading, by the nature of the case and by the express stipulation of the parties this was the sole and only issue respecting the lands that were involved or considered in that suit. In this question or controversy *all* the defendants were interested in the *same* way, though not perhaps to the same extent.

In Oberly vs. Gallagher, 93 U. S. 201, the rule is clearly stated thus:

If an indispensable party is a citizen of the same state with the plaintiff the jurisdiction will be defeated because the controversy will not be between citizens of different states and thus not within the judicial power of the United States as defined by the constitution.

Ayres vs. Chicago, 101 U. S. 184.

Upon the face of the record it is conclusively shown that the Navigation & Railroad Company, a necessary and indispensable party to the suit, was a citizen of the same state with the plaintiff. It is clear therefore that the federal courts had no jurisdiction to try the issues raised in that suit.

4. Upon the face of the record it clearly appeared that the Cir-

cuit Court of the United States had no jurisdiction to try the Homestead suit. The question arises was it competent for the parties to confer jurisdiction by consent, acquiescence or agreement. This question has been repeatedly answered by this court in the negative.

R. R. Company vs. Swan, 111 U. S. 385.
Capron vs. Van Noorden, 2 Cranch 126.
Jackson vs. Ashton, 8 Peters 148.

5. The next question is, was it competent for the state court to disregard or annul a judgment of the federal court in a collateral proceeding. That it was, we think is in accordance with well settled rules of law. In his work on judgments, Freeman Sect. 120, states the principles of law applicable in such cases as follows:

> A judgment pronounced by a tribunal having no authority to determine the matter in issue is necessarily and incurably void, and may be shown to be so in any collateral or other proceeding in which it is drawn in question.

In Elliot vs. Piersol, 1 Peters 340, it was held in a collateral proceeding that the Circuit Court of the United States for the District of Kentucky might question the jurisdiction of a county court of that state to order a certificate of acknowledgment to be corrected, and for want of such jurisdiction to regard the order as void. In that case the court said:

> Where a court has jurisdiction it has a right to decide every question which occurs in a cause, and whether its decision be correct or otherwise, its judgment until reversed is regarded as binding on every other court. But if it acts without authority its judgment and orders are regarded as nullities. They are not voidable, but simply void.

So in Williamson vs. Berry, 8 How, 540, where the authorities are carefully reviewed, this court said:

> It is a well settled rule in jurisprudence that the jurisdiction in *any* court exercising authority over a subject may be inquired into in *every other* court where the proceedings in the former are relied on and brought before the latter by a party claiming the benefit of such proceedings.

The rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery or the municipal laws of states.

So in Latham vs. Edgerton, 9 Cowen, 227, the court said:

The principle that a record cannot be impeached by pleading is not applicable when there is a want of jurisdiction. The want of it makes a record utterly void and unavailable for any purpose. The want of jurisdiction may *always* be set up against a judgment when it is to be enforced, or any benefit is claimed under it.

In Hickey vs. Stewart, 3 How. 762, this court was called upon to determine the validity of a judgment or decree rendered by the Supreme Court of the state of Mississippi in a cause between the same parties. In speaking of the right to inquire into the jurisdiction of the Mississippi court in a collateral action this language is used:

The power under which it acts must be looked into, and its authority to decide questions which it professes to decide must be considered. Upon principle it would seem that the operation of every judgment must depend on the power of the court to render that judgment, or in other words on its jurisdiction over the subject matter which it has determined.

See further,

Thompson vs. Whitman, 18 Wall, 466.
Harris vs. Hardeman, 14 How 334.

6. In the Homestead suit the record set forth in a positive form the facts which deprived the court of all authority to try the case. It is not possible therefore for this court to indulge in any presumption to sustain the validity of the decree in that case. It is a familiar rule of law that when the record shows that there was no jurisdiction either over the parties or the subject matter, any judgment rendered by the court is absolutely void, and may be so declared in any collateral proceeding.

In Galpin vs. Page, 18 Wall. 366, this court said:

The presumptions which the law implies in support of judgments of superior courts of general jurisdiction arise *only* with respect to jurisdictional facts concerning which the *record is silent.* When the record makes an

averment with reference to a jurisdictional fact it will not be presumed that the fact was otherwise than as averred.

So in Harris vs. Hardman, 14 How. 342, this court approved the doctrine contended for, in the following language:

> That a judgment is conclusive upon parties and privies is a proposition not to be denied; but if a court has acted without jurisdiction the proceeding is void, and *if this appear on the face of the record* the whole is a nullity.

So in Insurance Co. vs. Bangs, 103 U.S. 435, a suit had been brought in the United States Circuit Court of Michigan against an infant who was then absent from the state, and service of notice was made upon his general guardian only. The court in Michigan expressly held this service to be good. This court in a collateral suit declared the judgment void because the record showed on its face that the court in Michigan had no jurisdiction of the infant. To same effect see:

Elliott vs. Piersol, 1 Peters 340.
Thompson vs. Tolmie, 2 Peters, 162.
Voorhees vs. Bank, 10 Peters 477.
Thompson vs. Whitman, 18 Wall. 468.

II

1. In the next place we insist that in point of fact *there was no adjudication* in the Homestead suit as to the right to recover the taxes paid. That suit was brought primarily to restrain by injunction the prosecution of a large number of actions at law, and to establish in a single proceeding the plaintiff's title to the lands in controversy. The object in going into equity was to avoid a multiplicity of suits by restraining numerous actions of ejectment in all of which the contested question as to title was the same. Hence, as to this part of the case the suit was strictly a proceeding in equity.

1 Story Eq. Jur. sec. 457.
2 Id. sec. 854.

1 Pomeroy's Eq. Jur. sec. 254.
Bispham's Eq. sec. 417.
Woods vs. Monroe, 17 Mich. 238.
Railroad Co. vs. New York, 54 N. Y. 159.

In addition to the above relief, the plaintiff asked, in case it failed to make out a title to the lands, to have judgment against the several defendants for the taxes paid by each. Thus combined with a proceeding in equity were thirteen separate and independent actions at law, founded upon separate and distinct promises, and requiring proof of ownership of separate and distinct tracts of land. It is obvious that wholly disconnected from the claim for equitable relief these actions could not have been maintained in a court of equity, nor united in one proceeding in a court of law. The question then arises how could the mere bringing of a suit in equity, and the dismissal of the bill therein give the court of equity jurisdiction over separate and distinct actions at law; especially when it is remembered that to maintain the issues in equity it was necessary for plaintiff to show that *it* owned the lands, while to maintain the issues at law it was necessary for plaintiff to show that the *defendants* owned the lands, and that they were such owners at the time the taxes were paid. Now a plaintiff is never permitted in a court of equity to introduce evidence to sustain his claims to equitable relief, and then in anticipation of failure to get such relief, turn around and disprove or contradict just what he has previously shown.

In some instances where the plaintiff has shown himself entitled to some sort or degree of equitable relief a court of chancery will give him full and complete redress even though in doing so it becomes necessary to take cognizance of law issues. But such a thing is never done where a party utterly fails to maintain his bill in equity. In short a mere inability to sustain a bill in equity is no ground for a court of chancery to take cognizance of actions at law. If the mere trial of a cause in equity

and the dismissal of the bill would give the court jurisdiction of law cases, a plaintiff could have all law cases taken into a court of chancery by simply blending with them a claim for equitable relief. This view is strongly illustrated in cases where bills for discovery have been filed, and no discoveries obtained. In such cases the courts have uniformly held that courts of equity cannot take cognizance of law issues. Thus in Russel vs. Clark, 7 Cranch, 69, Marshall, C. J., delivering the opinion of the court, said:

> If the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession unaided by the confessions of the defendant, the established rules limiting the jurisdiction of courts require that he should be dismissed from the court of chancery and permitted to assert his rights in a court of law.

To same effect see

Crane vs. Bunnell, 10 Paige 335.
Roberts vs. Talifero, 7 Iowa 112.
1 Story's Eq. sec. 74.
1 Pomeroy's Equity, sec. 229.

To further illustrate the point, suppose a party should go into equity to reform a promissory note, alleging a mistake as to the amount, but should either offer no evidence of, or utterly fail to prove the mistake, could the court proceed and give the the plaintiff judgment on the simple unreformed note? Most clearly not.

The right to recover the taxes was based upon an implied promise arising from the payment of the taxes, by means whereof the lands of the defendants were relieved from a valid incumbrance in favor of the state.

Hence it is clear beyond dispute that the claim for the taxes as set forth in the bill in the Homestead suit was a purely *legal* right, for which the plaintiff had a plain, adequate and complete remedy at law. The dismissal of a bill in equity not being sufficient ground to authorize an equity court to try actions at law

the court in that suit had no right or authority to adjudicate the claim made for the repayment of the taxes.

By section 16 of the Judiciary Act of 1789, it is expressly provided:

> That suits in equity shall not be sustained in either court of the United States in any case where a plain, adequate and complete remedy can be had at law.

In such cases the question is regarded as one of jurisdiction, and hence it is the plain and positive duty of the court to dismiss the bill of complaint on its own motion even if the point is not raised in the pleadings, or suggested by the counsel.

Hipp vs. Babin, 19 How. 278.
Parker vs. Cotton Co. 2 Black 550.

The bill in the Homestead suit was dismissed, and no ground stated upon which the dismissal was made. The clear presumption of law is that as to the *legal issues* it was dismissed by the court for want of jurisdiction. As to such issues the statute, as well as the settled principles of law, made it the positive duty of the United States courts sitting in chancery to refuse or decline to exercise jurisdiction. It is doing no violence to law, reason or common sense to presume that the court performed a duty so pointedly enjoined upon it.

The argument of the court in Wright vs. Deklynne, 1 Curtis C.C. 202, is so clear and conclusive on this point that we quote therefrom the following:

> What is the point directly decided by dismissing a bill in equity? Nothing more than this, that the case is not fit for the decision of that court; that complainant, who must rely entirely upon the equity of his case, has not supported that claim, and therefore has not shown himself entitled to the aid of a court of equity, for which reason he is turned out of that court. This dismission would be a bar to a new bill, because the same question must arise, viz: whether his case is such as to entitle him to the relief of a court of equity.
>
> But in relation to a strictly *legal right* the dismission proves nothing for or against it. If the complainant seeking a court of equity to enforce a strictly *legal right*, when his remedy at law is plain and adequate, the dis-

missal of the bill amounts to a declaration that he has no *equity*, and the court *has no jurisdiction*, but it casts no reflection on his legal title; it decides nothing in relation to it, and consequently can conclude nothing against it.

So in Foster vs. Busteed, 100 Mass. 407, the court held that

Where in an answer various matters of defence are set up, some of which relate *only* to the maintenance of the suit, and others to the merits, and there is a *general* decree of bill dismissed from which it does not appear what was the prevailing ground of defense, it is *impossible* to hold that the decree operates to preclude future proceeding.

To same effect see

Griffin vs. Seymour, 15 Iowa 32.

To render the judgment conclusive, it must appear *by record* of the prior suit that the particular matter sought to be concluded was *necessarily* tried and determined.

Washington Packet Co. vs. Sickles, 5 Wall. 592.

Supples vs. Cannon, 44 Conn. 429.

In the Homestead suit the circuit court might have dismissed the claim for the taxes, either upon the ground that they were not recoverable, or because the plaintiff had a plain and adequate remedy at law. It is impossible to determine upon what ground the decision of the court as regards the taxes was based. Hence it is impossible for this oourt to say that the merits of the claim for the taxes was necessarily tried and determined by that court.

This view is fully sustained by the Supreme Court of Massachusetts in Foster vs. the Richard Busteed, 100 Mass. 411:

In that case there was a petition filed to enforce a lien on a vessel for labor in constructing it, and in defense a *general* decree dismissing a former petition to enforce the same lien was produced, which decree had been rendered on an agreed statement of facts, from which it appeared that the former petition had been prematurely brought, and might have been dismissed for that reason. The court said the agreed facts appear to us to admit a cause of action except for these objections, but the entry was in general terms; no specific reasons were assigned, and we cannot explore the mind of the court to explain what the real reasons were. It may therefore be left uncertain whether the former judgment was against the merits of

the petitioners claim, or was based on these technical objections. To be a bar to future proceedings it must appear that the former judgment *necessarily involved the determination of the same fact*, to prove or disprove which it is pleaded or introduced in evidence.

In this connection it may be stated as a well settled rule of law that:

> A decree of dismissal, when made because of some defect of pleading, or for want of jurisdiction, or because the complainant has an *adequate remedy at law*, or upon some other ground that does not go to the merits, is not a final adjudication.

Hughes vs. United States 4 Wall, 237.

2. In section 283 of Story's Equity Pleadings, the author lays down this rule:

> Although a bill is ordinarily open to objection for multifariousness which contains two distinct subject matters wholly disconnected with each other: yet if one of them be clearly without the jurisdiction of a court of equity for redress, it seems that the court will treat the bill as if it were single, and proceed with the other matter over which it has jurisdiction as if it constituted the sole object of the bill.

The decree in the Homestead suit indicates very clearly that the circuit court followed the above rule in that suit. The decree is specific in its provisions. It orders that the plaintiff's bill *as to the lands* in certain townships be dismissed; that the bill for indemnity lands be dismissed, and that the bill *as to the lands* in certain other townships be dismissed without prejudice. Not a word is anywhere said about dismissing the bill as to the claim for the taxes. This claim being of a strictly legal nature and wholly disconnected with the subject matter of settling in equity the title to the lands, the court treated the bill as single, and simply ignored the demand for the taxes.

III

1. The next question is, does the decision of the state court that the lands were subject to taxation after the 2d day of March, 1861, for that year, notwithstanding the title thereto remained in the United States till that date, involve a federal question? It

cannot be denied that the liability of the lands to taxation after the above date depends wholly upon the provisions of state statutes. That this is not a matter of federal cognizance is certainly true. Hence, to give this court jurisdiction, it must appear *affirmatively on the face of the record that the state court decided, either actually or by necessary intendment, that the lands were taxable prior to the 2d day of March*, 1861.

Chouteau vs. Gibson, 111 U. S. 200.
Murdock vs. Memphis, 20 Wall. 636.

The record in this case does not show any such thing. In the opinion of the court, which by the laws of Iowa is part of the record, there is not a word or sentence that can be tortured into a ruling that the lands were taxable before the second of March, 1861. As a matter of fact no such question was ever raised or decided by the court.

Neither was any such ruling *necessary* to the judgment rendered by the state court. This court in effect so declared in Litchfield vs. Webster Co. 101 U. S. 774, where after deciding that the title to the lands continued in the United States during 1859 and 1860, and till March 2d, 1861, it is said:

"This disposes of the taxes for the years 1859 and 1860, but *another question arises as to those of 1861*. Under the *revenue laws of Iowa in force at that time* government lands entered or located, or lands purchased from the state could not be taxed for the year in which the entry location or purchase was made."

Here is a plain and positive declaration on the part of this court that the liability of these lands for the taxes of 1861 depends entirely upon the construction to be given to the revenue laws of the state of Iowa.

To illustrate: Suppose the legislation had expressly provided that all lands obtained or purchased from the United States before the 3rd day of March in any year should be liable for taxes that year the same as other lands, could this court un-

der pretense of deciding a federal question declare such a provision of the statute void and of no effect? Most clearly not. There can be no honest pretense that such a question is one of federal cognizance. Yet the legal effect of the decision of the state court in this case is nothing more nor less than that under the laws of Iowa land, the title to which has remained in the United States till the 3rd day of March in any year, is taxable for that year. This view is fully sustained by the authorities.

Thus in Stryker vs. Polk Co., 22 Iowa 135 it is said:

"If plaintiff from that time (March 2, 1861,) did not have a taxable interest in this land we do not well see how he could acquire it. He held under a deed from the state; the state claimed under the original grant, the list being duly certified; he was a *bona fide purchaser*, and the title still retained by the United States was relinquished to the state for his use.

"Conceding then that this land was most clearly liable to taxation after March 2, 1861, it only remains to inquire whether it was liable prior to that time."

So in a very recent decision by the Supreme Court of Wisconsin, it appears that certain railroad lands had been exempted from taxation by the legislature for a period of ten years from the passage of the act. The act was passed in May 1866, and the exemption expired in 1876. The assessment for that year closed on the 4th day of June. It was held that the lands could be taxed at any time before the close of the assessment for that year. The court said:

"The material fact is the lands were assessed for taxation in 1876, properly so if they were subject to taxation at any time before the fourth Monday in June of that year, otherwise not."

Wisconsin R. R. Co. vs. Lincoln Co., 15 N. W. Rep. 124.

Bell vs. Pierce, 51 N. Y. 12.

People vs. Chemung, Co., 11 N. Y. 563.

In Goodnow vs. Wells, 25 N. W. Rep. 866, speaking of these DesMoines river lands the court says:

"We discover that the title fully vested in defendant's grantor March 2, 1861. Under the laws then in force (Revision sect. 710) all property was li-

able to taxation except such as was exempted by Revision sect. 711 which provides that government lands entered or located, or lands purchased from the state shall not be taxed for the year in which the entry, location or purchase is made. * * It is clear that the provision above quoted exempting lands from taxation does not apply to these lands as having been "entered" or "located." The lands were not *purchased* from the state in 1861, but in 1858 and the legislation and patent of the state conveyed the state's interest in the land, and the interest after acquired by the state inured to the purchaser and his title by relation ran back to the grant by the state. The lands cannot be exempt from taxation as having been purchased from the state in 1861. We reach the very satisfactory conclusion that the lands were subject to taxation for the year 1861."

All that the state court decided was that the lands became liable to taxation on the 2nd day of March 1861, notwithstanding that prior to that date they were exempt from such taxation. But this court is asked to hold that they were not subject to taxation for nearly ten months after the above date and after the title thereto had been acquired by the plaintiff in error. No such ruling can be made by this court without usurping a jurisdiction that it does not lawfully possess.

The adverse counsel relies upon the reporter's note appended to the case of Litchfield vs. Webster County, 101 U. S. Reports page 781. The statement of the reporter would seem to be inaccurate in as much as it is wholly inconsistent with the rulings made in the main case, and certainly should not be approved or followed by this court as an authority or binding precedent.

In as much as the judgment of the State Court is sustainable on the ground that the lands were taxable after March 2nd, 1861 under the laws of Iowa, a ruling that they were taxable prior to that date would not in this case authorize this court to reverse the case.

Rector vs. Ashley, 6 Wall 142.
Moore vs. Mississippi, 21 Wall 636.
Klinger vs. State, 13 Wall 204.

IV

1. The state court decided that the decree in the Homestead suit was not a bar to plantiff's right of action. On this point the court used the following language:

"The claim is that the taxes in question were actually covered by the adjudication in the case of the Iowa Homestead Company against the Des Moines Navigation and Railroad Company. In our opinion this claim cannot be sustained. *The taxes in question were not only no part of the taxes sought to be recovered in that action*, but they were not paid by plaintiff in that action. They were paid by the Dubuque and Sioux City Railroad Company and neither it nor its assignee the present plaintiff was a party to that action. The defendant contends that the Dubuque and Sioux City Railroad Company was substantially a party to that action because the plaintiff in that action claimed a part of the lands by deed of warranty from the Dubuque and Sioux City Railroad Company and notified that company of the pending of the action. The effect however of such notification would be only to bind the Dubuque and Sioux City Railroad Company by the adjudication in respect to title. In that, the Dubuque and Sioux City Railroad Company was interested by reason of its deed of warranty, but had no interest in the taxes sought to be recovered. So far as the issue was concerned involving a right of recovery for the taxes *it was in no possible sense a party*. The adjudication in that case then does not operate as a bar in this."

The sole and only allegation in the bill touching the payment of the taxes is in the following words:

"The said plaintiffs have been in possession of the lands claimed by them, themselves or their vendees in contract since 1861. *They have paid the taxes thereon* to the state of Iowa since, in all amounting to $80.000, and if their title has failed they are entitled to have *their* taxes refunded since 1861, by the holder of the legal title who has not paid them."

In the prayer of the bill the *only* words in reference to the taxes were the following:

"The plaintiff prays that in the event of a decree that plaintiff's present title, or any part of it has failed that the Des Moines Navigation & Railroad Company ,and its assigns may be decreed to repay to plaintiff all the taxes which *he has paid* on said lands and interest thereon."

The mere reading of the bill shows conclusively that the taxes sought to be recovered in *this* action were not sued for in

the Homestead suit– they were neither mentioned, described nor referred to in the pleadings in that case. The taxes sought to be recovered in *that* case were taxes *paid by the Homestead Company*, while the taxes sued for in *this* case are taxes *paid by the Dubuque & Sioux City Railroad Company.*

Had the court in the Homestead suit held the taxes recoverable it is obvious that evidence of the payment of taxes by the railroad company would have been irrelevent or incompetent under the foregoing allegation of the bill. That allegation had reference *solely* to taxes paid by the plaintiff, the Homestead Company and not to taxes paid by the railroad company. Hence the taxes claimed in *this* action could not possibly have been recovered in *that* under the pleadings as they stood. As no decree could have been rendered for the benefit of the railroad company it follows that that company cannot be prejudiced by the decreed judgment therein rendered.

The claim that the railroad company was ever a party to the Homestead suit and that its rights were adjudicated therein merely because it was a stockholder and owned a majority of the stock in the Homestead Company is scarcely worthy of serious consideration. The railroad company simply as stockholder was no more a party to the suit than other stockholders. In actions brought in the names of corporations it is a familiar rule that the corporations and not the stockholders are the parties to the action.

Bank vs. Wister, 2 Peters 322.
Louisville R. R. Co., 2 How. 558.

All of which are respectfully submitted.

GEORGE CRANE,
Attorney for Plaintiff.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 42.

THOMAS H. STRYKER, EXECUTOR, PLAINTIFF IN ERROR.

vs.

GEO. CRANE, ADMINISTRATOR, DEFENDANT IN ERROR.

ON ERROR FROM THE SUPREME COURT OF IOWA.

BRIEF IN REPLY.

C. H. GATCH AND WM. CONNOR, FOR PLAINTIFF IN ERROR.
GEO. CRANE, FOR DEFENDANT IN ERROR.

P. C. Kenyon, Publisher Law Briefs, Des Moines.

IN THE

Supreme Court of the United States.

THOMAS H. STRYKER, Ex'r, *Plaintiff in Error,*
vs.
GEO. CRANE, Administrator, *Defendant in Error.*

No. 42.

On Error from the Supreme Court of Iowa.

C. H. Gatch and William Connor, *for Plaintiff in Error.*
Geo. Crane, *for Defendant in Error.*

BRIEF IN REPLY.

I.

In answer to that part of our opening argument in which it is claimed that defendant in error is estopped by the adjudication in the case of *Homestead Company vs. Valley Railroad*, 17 Wall., 173, it is objected that that adjudication was void, for want of jurisdiction, the alleged want of jurisdiction consisting of the fact that all of the defendants in the former suit were not citizens of a different state from that of which the plaintiff was a citizen.

After the cause was removed to the United States circuit court, the plaintiff Homestead company, October, 23, 1870, "by leave of court and consent of counsel," amended its petition (Fol. 24–25). Previously to this, but after the removal (28–29), it stipulated that the answers of certain named defendants, in-

cluding its own, should "be deemed and taken as the answer of the several defendants herein." When the cause came on for hearing in the circuit court, it stipulated as to what questions it should be heard upon, and that it should not be heard upon any other (29), and the decree of the court recited that on the hearing it appeared by Elwood, Nourse and Withrow.

After the hearing and decree in that court, a written stipulation was filed, in which it joined with the other defendants, by which it was, among other things, stipulated as follows:

> And it is further stipulated that the defendants, Samuel G. Wolcott, Edwin C. Litchfield, William J. McAlpine, Richard B. Chapman, Electus B. Litchfield, Edward Wade and John Stryker, each and all of whom are citizens of New York, and the Des Moines Navigation and Railroad Company, duly appeared in this court and filed their joint and several answers to complainant's bill, duly verified. * * * And it is furthur stipulated and agreed that the answer of defendant William B. Welles, verified by him, with the necessary changes and variations, to show and present the proper and respective interest of defendants Samuel G. Wolcott, Edwin C. Litchfield, Edward Wade and John Stryker, *and* the Des Moines Navigation and Railroad Company, shall be taken, treated and deemed the answer of said last mentioned defendants herein (31–32).

And, finally, after the case came into this court, it again stipulated that the evidence in the court below established certain facts therein recited (32–33).

It would certainly be most remarkable if, upon such a record, after final decree in this court, the validity of the decree could be collaterally assailed and treated as a nullity. Without going into an elaborate discussion of the question, we are content to submit it upon the following authorities.

In *Skillern's Ex'rs vs. May's Ex'rs*, 6 Cranch., 267, it was held "too late to question the jurisdiction of the circuit court after the cause has been sent back by mandate."

The case came to this court upon the following certificate of division:

> In this case a final decree had been pronounced, and by writ of error removed to the supreme court, who reversed the decree, and after the

cause was sent back to this court it was discovered to be a case not within the jurisdiction of the court; but the question arose, whether it can now be dismissed for want of jurisdiction after the supreme court has acted thereon. The opinion of the judges of this court being opposed on this question, it is ordered "that the same be adjourned to the supreme court for their decision."

The court determined the question as follows:

It appearing that the merits of this cause had been finally decided in this court, and that its mandate required only the execution of its decree, it is the opinion of this court that the circuit court is bound to carry that decree into execution, although the jurisdiction of that court be not alleged in the pleadings.

In *McCormic vs. Sullivant*, 10 Wheat., 192, it was held:

The courts of the United States are courts of *limited* but not *inferior* jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgments and decrees may be reversed for that cause on a writ of error and appeal, but until reversed they are conclusive evidence between parties and privies.

Defendants relied upon the former decree of one of the Federal courts in a suit where the record failed to show the citizenship of the parties to be such as was requisite to confer jurisdiction. It was claimed that by reason of this defect the suit was *coram non judice*, and the decree therefore void; but the court, on page 199, said:

But this reason proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not on that account inferior courts in the technical sense of those words, whose judgments taken alone are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may upon a writ of error, or appeal, be reversed for that cause. *But they are not absolute nullities.*

And on same page, referring to the case of *Skillern's Execrs. vs. May's Execrs.*, used the following language:

That suit came before this court upon a writ of error, where the decree of the court below was reversed and the cause remanded for further proceedings to be had therein. After this it was discovered by that court that the jurisdiction was not stated in the proceedings, and the question was made, whether that court could dismiss the suit for that

reason? This point, on which the judges were divided, was certified to the supreme court, where it was decided that the merits of the cause having been finally decided in this court and its mandate only requiring execution of its decree, the court below, was bound to carry that decree into execution *notwithstanding* the jurisdiction of that court was not alleged in the pleadings. Now, it is very clear that, if the decree had been considered a nullity, on the ground that jurisdiction was not stated in the proceedings, this court could not have required it to be executed by the inferior court.

In *Kennedy et al. vs. Georgia State Bank et al.*, 8 How., 586, it was held that—

If the jurisdiction of a circuit court be not shown in the proceedings in the case, its judgment is erroneous and liable to be reversed, but is not an absolute nullity.

In this court the record was, by consent, so amended as to show jurisdiction. The court, on page 611, uses this language:

But if no amendment had been made, would the orders and decrees in the case by the circuit court have been nullities? That they would have been erroneous and liable to be reversed is admitted. In *Skillern's Ex'rs vs. May's Ex'rs*, 6 Cranch., 267, a final decree had been pronounced, and by writ of error removed to the supreme court, who reversed the decree, and after the cause was sent back to the circuit court, it was discovered to be a *cause not within the jurisdiction of the court;* but a question arose whether in that court it could be dismissed for want of jurisdiction *after the supreme court had acted thereon.* The opinion of the judges being opposed on that question, it was certified to the supreme court for their decision, and this court held "that the circuit court was bound to carry the decree into execution, although the jurisdiction of that court be not alleged in the pleadings."

In *Washington Bridge vs. Stewart*, 3 Howard, 413, it was held:

After a case has been decided upon its merits and remanded to the court below, if it is again brought up on a second appeal it is then too late to allege that the court had not jurisdiction to try the first appeal.

The court say, on page 424: "The want of jurisdiction is a a matter of abatement;" and further, on same page, referring to the case of *Skillerns' Executors vs. Mays' Executors*, 6 Cranch., *supra:*

The jurisdiction of this court in that case was as defective as it is said to have been in this, when that cause was before this court, though the

judgment of the court below on it would have been reversed upon motion for the want of jurisdiction, *on the face of the record*, the defect having escaped the notice of the court and of counsel, and the court having acted upon its merits, it determined that its decree should be executed. The reason for its judgment, no doubt, was that the motion to dismiss the case in the court below for the want of jurisdiction, after it had been before the supreme court by writ of error and had been acted upon, would have been equivalent had it been allowed to a decision that the judgment of this court might be reviewed when law points out no mode in which that can be done either by this or any other court.

In *DeSobry vs. Nicholson*, 3 Wallace, 420, it was held:

A motion to dismiss a case from want of proper citizenship in the parties cannot be made at the trial and after pleading a general issue and special defenses.

The court say, on page 423:

The objection to jurisdiction upon the ground of citizenship, in actions at law, can only be made by a plea in abatement. After the general issue it is too late. It cannot be raised at the trial upon the merits. If a plea in abatement be filed with the general issue the latter waives the former. Where a plea in abatement is relied upon the burden of proof rests upon the defendant. In equity the defense must be presented by plea or demurrer and not by answer. The court below properly overruled the motion.

II.

Upon the question as to when and how far this court will consider and determine questions of state or common law, "for purposes which involve questions giving it jurisdiction," we here refer to the following additional authorities:

Martin vs. Hunter, 1 Wheat, 304, was an action of ejectment in which the plaintiff claimed title under a patent from the state of Virginia and the defendant as devisee of Lord Fairfax by a title which it was claimed by plaintiff was invalid; first, because Lord Fairfax, at the time of his death, had not acquired the absolute property in the land by actual seizin and possession; and, second, because the devisee was an alien at the time of the testator's death and could therefore not take the land by devise.

The validity of the plaintiff's patent depended upon whether

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Referring to which the court on pages 357, *et seq.*, say:

> The objection urged at the bar is, that this court cannot inquire into the title, but simply into the correctness of the construction put upon the treaty by the court of appeals, and that their judgment is not re-examinable here, unless it appear on the face of the record that some construction was put upon the treaty. If, therefore, that court might have decided the case upon the invalidity of the title (and *non constat*, that they did not), independent of the treaty, there is an end of the appellate jurisdiction of this court. * * * If this be the true con-

struction of the section it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this narrow construction, and there are the strongest reasons against it, founded upon the words as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section, a suit where is drawn in question the construction of a treaty and the decision is against the title set up by the party. It is therefore a decision *against the title set up with reference to the treaty*, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty until it is ascertained what that title is, and whether it have a legal validity? From the very necessity of the case there must be a *preliminary inquiry* into the existence and structure of the title before the court can construe the treaty in reference to that title.

If the court below should decide that the title was bad, and therefore not protected by the treaty, must not this court have a power to decide the title to be good, and therefore protected by the treaty? * * * One of the questions is, as to the construction of a treaty, upon a title specially set up by a party, and every error that immediately respects that question must, of course, be within the cognizance of the court. The title set up in this case is apparrent upon the face of the record, and immediately respects the decision of that question; and error, therefore, *in respect to that title*, must be re-examinable, or the case could never be presented to the court. * * * But the point has been already decided by the court upon solemn argument. In *Smith vs. State of Maryland*, (6, Cranch, 286), precisely the same objection was taken by counsel, and overruled by the unanimous opinion of the court. This case was in some respects, stronger than the present; for the court below decided expressly, that the party had no title, and therefore, the treaty could not operate upon it. This court entered into an examination of that question, and being of the same opinion, affirmed the judgment. There cannot, then, be an authority which could more completely govern the present question.

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trary; and in that case the party is entitled to the benefits intended to be secured by the treaty. The decision to his prejudice may have been the result of those very errors, partialities or defects in state jurisprudence against which the constitution intended to protect the individual.

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A writ of error lies to the highest court of the state in a case where the question is, whether a confiscation *under the laws of the state*, was complete before the treaty of peace with Great Britain.

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If this property was confiscated and the right to it vested in the state by the acts of October, 1780, C. 45 & C. 49 the Chancellor does not perceive how it can be affected by the 6th article of the treaty of 1783, declaring that there should be no future confiscation made.

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Referring to which it is said in the opinion, page 304;

It is contended by the defendants in error that the question involved in the case turns exclusively upon the construction of the confiscation laws of the state of Maryland passed prior to the treaty of peace, and that no question relative to the construction of that treaty did or could occur. That the only point in dispute was whether the confiscation of the land in controversy was complete or not by the mere operation of those laws without any further act done.

The court, nevertheless, proceeded to consider and determine the question, whether or not the confiscation was complete under the laws of the state of Maryland, before the treaty, and finding and holding that it was, affirmed the judgment of the state court.

If this court could, in these cases, because of its relation to a federal question, consider and determine, as a question of state law, whether or not a property right had been lost, *by confiscation*, why may it not, in this case, for the same reason, consider and determine whether or not the plaintiff in error, in any other manner, depending on state or common law, lost the immunity he would otherwise be entitled to, under the judgment in question.

C. H. GATCH AND
WILLIAM CONNOR,
Attorneys for Plaintiff in Error.

123-521

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 43.

THOMAS H. STRYKER, EXECUTOR, PLAINTIFF IN ERROR.

vs.

GEO. CRANE, ADMINISTRATOR, DEFENDANT IN ERROR.

ON ERROR FROM THE SUPREME COURT OF IOWA.

BRIEF IN REPLY.

C. H. GATCH AND WM. CONNOR, FOR PLAINTIFF IN ERROR.
GEO. CRANE, FOR DEFENDANT IN ERROR.

P. C. Kenyon, Publisher Law Briefs, Des Moines.

IN THE

Supreme Court of the United States.

THOMAS H. STRYKER, Ex'r,
Plaintiff in Error,
vs.
GEO. CRANE, Administrator,
Defendant in Error.

No. 43.

On Error from the Supreme Court of Iowa.

C. H. Gatch and William Connor, *for Plaintiff in Error.*
Geo. Crane, *for Defendant in Error.*

BRIEF IN REPLY.

I.

In answer to that part of our opening argument in which it is claimed that defendant in error is estopped by the adjudication in the case of *Homestead Company vs. Valley Railroad*, 17 Wall., 173, it is objected that that adjudication was void, for want of jurisdiction, the alleged want of jurisdiction consisting of the fact that all of the defendants in the former suit were not citizens of a different state from that of which the plaintiff was a citizen.

After the cause was removed to the United States circuit court, the plaintiff Homestead company, October, 23, 1870, "by leave of court and consent of counsel," amended its petition (Fol. 36–37). Previously to this, but after the removal (41), it stipulated that the answers of certain named defendants, in-

cluding its own, should "be deemed and taken as the answer of the several defendants herein." When the cause came on for hearing in the circuit court, it stipulated as to what questions it should be heard upon, and that it should not be heard upon any other (42), and the decree of the court recited that on the hearing it appeared by Elwood, Nourse and Withrow.

After the hearing and decree in that court, a written stipulation was filed, in which it joined with the other defendants, by which it was, among other things, stipulated as follows:

> And it is further stipulated that the defendants, Samuel G. Wolcott, Edwin C. Litchfield, William J. McAlpine, Richard B. Chapman, Electus B. Litchfield, Edward Wade and John Stryker, each and all of whom are citizens of New York, and the Des Moines Navigation and Railroad Company, duly appeared in this court and filed their joint and several answers to complainant's bill, duly verified. * * * And it is furthur stipulated and agreed that the answer of defendant William B. Welles, verified by him, with the necessary changes and variations, to show and present the proper and respective interest of defendants Samuel G. Wolcott, Edwin C. Litchfield, Edward Wade and John Stryker, *and* the Des Moines Navigation and Railroad Company, shall be taken, treated and deemed the answer of said last mentioned defendants herein (44).

And, finally, after the case came into this court, it again stipulated that the evidence in the court below established certain facts therein recited (45–46).

It would certainly be most remarkable if, upon such a record, after final decree in this court, the validity of the decree could be collaterally assailed and treated as a nullity. Without going into an elaborate discussion of the question, we are content to submit it upon the following authorities.

In *Skillern's Ex'rs vs. May's Ex'rs*, 6 Cranch., 267, it was held "too late to question the jurisdiction of the circuit court after the cause has been sent back by mandate."

The case came to this court upon the following certificate of division:

> In this case a final decree had been pronounced, and by writ of error removed to the supreme court, who reversed the decree, and after the

cause was sent back to this court it was discovered to be a case not within the jurisdiction of the court; but the question arose, whether it can now be dismissed for want of jurisdiction after the supreme court has acted thereon. The opinion of the judges of this court being opposed on this question, it is ordered "that the same be adjourned to the supreme court for their decision."

The court determined the question as follows:

It appearing that the merits of this cause had been finally decided in this court, and that its mandate required only the execution of its decree, it is the opinion of this court that the circuit court is bound to carry that decree into execution, although the jurisdiction of that court be not alleged in the pleadings.

In *McCormic vs. Sullivant*, 10 Wheat., 192, it was held:

The courts of the United States are courts of *limited* but not *inferior* jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgments and decrees may be reversed for that cause on a writ of error and appeal, but until reversed they are conclusive evidence between parties and privies.

Defendants relied upon the former decree of one of the Federal courts in a suit where the record failed to show the citizenship of the parties to be such as was requisite to confer jurisdiction. It was claimed that by reason of this defect the suit was *coram non judice*, and the decree therefore void; but the court, on page 199, said:

But this reason proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not on that account inferior courts in the technical sense of those words, whose judgments taken alone are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may upon a writ of error, or appeal, be reversed for that cause. *But they are not absolute nullities.*

And on same page, referring to the case of *Skillern's Execrs. vs. May's Execrs.*, used the following language:

That suit came before this court upon a writ of error, where the decree of the court below was reversed and the cause remanded for further proceedings to be had therein. After this it was discovered by that court that the jurisdiction was not stated in the proceedings, and the question was made, whether that court could dismiss the suit for that

reason? This point, on which the judges were divided, was certified to the supreme court, where it was decided that the merits of the cause having been finally decided in this court and its mandate only requiring execution of its decree, the court below, was bound to carry that decree into execution *notwithstanding* the jurisdiction of that court was not alleged in the pleadings. Now, it is very clear that, if the decree had been considered a nullity, on the ground that jurisdiction was not stated in the proceedings, this court could not have required it to be executed by the inferior court.

In *Kennedy et al. vs. Georgia State Bank et al.*, 8 How., 586, it was held that—

If the jurisdiction of a circuit court be not shown in the proceedings in the case, its judgment is erroneous and liable to be reversed, but is not an absolute nullity.

In this court the record was, by consent, so amended as to show jurisdiction. The court, on page 611, uses this language:

But if no amendment had been made, would the orders and decrees in the case by the circuit court have been nullities? That they would have been erroneous and liable to be reversed is admitted. In *Skillern's Ex'rs vs. May's Ex'rs*, 6 Cranch., 267, a final decree had been pronounced, and by writ of error removed to the supreme court, who reversed the decree, and after the cause was sent back to the circuit court, it was discovered to be a *cause not within the jurisdiction of the court;* but a question arose whether in that court it could be dismissed for want of jurisdiction *after the supreme court had acted thereon.* The opinion of the judges being opposed on that question, it was certified to the supreme court for their decision, and this court held "that the circuit court was bound to carry the decree into execution, although the jurisdiction of that court be not alleged in the pleadings."

In *Washington Bridge vs. Stewart*, 3 Howard, 413, it was held:

After a case has been decided upon its merits and remanded to the court below, if it is again brought up on a second appeal it is then too late to allege that the court had not jurisdiction to try the first appeal.

The court say, on page 424: "The want of jurisdiction is a a matter of abatement;" and further, on same page, referring to the case of *Skillerns' Executors vs. Mays' Executors*, 6 Cranch., *supra:*

The jurisdiction of this court in that case was as defective as it is said to have been in this, when that cause was before this court, though the

judgment of the court below on it would have been reversed upon motion for the want of jurisdiction, *on the face of the record*, the defect having escaped the notice of the court and of counsel, and the court having acted upon its merits, it determined that its decree should be executed. The reason for its judgment, no doubt, was that the motion to dismiss the case in the court below for the want of jurisdiction, after it had been before the supreme court by writ of error and had been acted upon, would have been equivalent had it been allowed to a decision that the judgment of this court might be reviewed when law points out no mode in which that can be done either by this or any other court.

In *DeSobry vs. Nicholson*, 3 Wallace, 420, it was held:

A motion to dismiss a case from want of proper citizenship in the parties cannot be made at the trial and after pleading a general issue and special defenses.

The court say, on page 423:

The objection to jurisdiction upon the ground of citizenship, in actions at law, can only be made by a plea in abatement. After the general issue it is too late. It cannot be raised at the trial upon the merits. If a plea in abatement be filed with the general issue the latter waives the former. Where a plea in abatement is relied upon the burden of proof rests upon the defendant. In equity the defense must be presented by plea or demurrer and not by answer. The court below properly overruled the motion.

II.

Upon the question as to when and how far this court will consider and determine questions of state or common law, "for purposes which involve questions giving it jurisdiction," we here refer to the following additional authorities:

Martin vs. Hunter, 1 Wheat, 304, was an action of ejectment in which the plaintiff claimed title under a patent from the state of Virginia and the defendant as devisee of Lord Fairfax by a title which it was claimed by plaintiff was invalid; first, because Lord Fairfax, at the time of his death, had not acquired the absolute property in the land by actual seizin and possession; and, second, because the devisee was an alien at the time of the testator's death and could therefore not take the land by devise.

The validity of the plaintiff's patent depended upon whether

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If the court below should decide that the title was bad, and therefore not protected by the treaty, must not this court have a power to decide the title to be good, and therefore protected by the treaty? * * * One of the questions is, as to the construction of a treaty, upon a title specially set up by a party, and every error that immediately respects that question must, of course, be within the cognizance of the court. The title set up in this case is apparrent upon the face of the record, and immediately respects the decision of that question; and error, therefore, *in respect to that title*, must be re-examinable, or the case could never be presented to the court. * * * But the point has been already decided by the court upon solemn argument. In *Smith vs. State of Maryland*, (6, Cranch, 286), precisely the same objection was taken by counsel, and overruled by the unanimous opinion of the court. This case was in some respects, stronger than the present; for the court below decided expressly, that the party had no title, and therefore, the treaty could not operate upon it. This court entered into an examination of that question, and being of the same opinion, affirmed the judgment. There cannot, then, be an authority which could more completely govern the present question.

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The court, nevertheless, proceeded to consider and determine the question, whether or not the confiscation was complete under the laws of the state of Maryland, before the treaty, and finding and holding that it was, affirmed the judgment of the state court.

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C. H. GATCH AND
WILLIAM CONNOR,
Attorneys for Plaintiff in Error.

123-5-24 No 960
43

FILED
OCT 17 1884
JAMES H. McKENNEY
CLERK

IN SUPREME COURT OF THE UNITED STATES.

JOHN STRYKER, *Plaintiff in Error*,

vs.

EDWARD K. GOODNOW, *Defendant in Error*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

On Motion to Dismiss Writ of Error or affirm Judgment.

C. H. GATCH, for Plaintiff in Error.

GEO. CRANE, for Defendant in Error

DEFENDANT'S BRIEF.

123-5-21 No 960
4/2

IN SUPREME COURT OF THE UNITED STATES.

JOHN STRYKER, *Plaintiff in Error*,

vs.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

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vs.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

C. H. GATCH, for Plaintiff in Error.

GEO. CRANE, for Defendant in Error

Argument on Motion to quash Writ of Error.

I.

During the years 1861-2&3, the title to certain lands situated in Webster county, Iowa, was in controversy between different claimants thereto. The Dubuque & Sioux Clty Railroad Company claimed title under the act of Congress approved May 15, 1856, granting lands to the State of Iowa to aid in the construction of certain railroads in that State. The DesMoines Navigation & Railroad Company and its grantees claimed title under an act of Congress approved August 8th, 1846, granting lands to the territory of Iowa to aid in the improvement of the navigation of the DesMoines River. The appellant Stryker is one of the grantees of the Des Moines Navigation & Railroad company (and Goodnow, the appellee, is the assignee of the claim of the Dubuque and Sioux City Railroad Company.) By the decisions of the courts, the title to said lands was finally establilshed in the Des Moines Navigation and Railroad company and

its grantees. While this litigation was going on, the Dubuque & Sioux City Railroad company, the defeated party, paid the taxes, which were assessed upon the lands in controversy. Under the law of Iowa, the said road company, who paid the taxes assessed during the litigation had the right to recover them back from the party who succeeded in establishing his ownership of the lands. This principle of law is applicable however, only where the taxes have been assessed upon lands, that are legally subject to taxation. The railroad company assigned its right to recover the taxes paid during the litigation to the appellee, Goodnow.

In this case it appears that the legal title to the lands remained in the United States till the second day of March, 1861. It is claimed that while the title thus remained in the government, the lands were not liable to be taxed by the state authorities. That as this exemption is secured by a statute of the United States, a decision against such exemption raises a federal question that gives this court jurisdiction. The state court decided that the lands were taxable for the year 1861, notwithstanding the appellant did not receive his title thereto, till the 2nd day of March of that year.

II.

As a futher defense to the whole demand, it was claimed that the right of the Dubuque and Sioux City Railroad company, the assignor of the appellee had been adjudicated and adversely determined in the suit of the Iowa Homestead company against the Des Moines Navigation & Railroad company, said Stryker and others at the October term, 1872, of this court.

This suit was commenced by the Iowa Homestead company against the DesMoines Navigation and Railroad company, and the grantees of the latter, including the appellant, Stryker, for the purpose, primarily of determining the title to lands claimed under the conflicting grants heretofore mentioned. In addition to asking to have its title to the lands established the Homestead company, prayed, in case of failure to obtain such title, to have judgment against the defendants for the taxes which it had paid on the lands during the controversy about the ownership thereof.

As a matter of fact, the Dubuque and Sioux City Railroad company, prior to the commencement of the above suit, had conveyed all its interest and title in said lands to the Iowa Home-

stead company by deed of general warranty. The railroad company therefore took an interest in and paid the final expenses of said Homestead suit, for the reason that it was bound to make good the title which it had conveyed with covenant of warranty. It is conceded that the Dubuque & Sioux City Railroad company, the assignor of the appellee in this case was not a party of record to the suit brought by the Homestead company.

In the due course of litigation, this court affirmed the decree of the United States circuit court for Iowa, establishing title to the lands in the Des Moines Navigation & Railroad company, and its several grantees and denying the right of the Homestead company to recover the taxes paid.

In the case at bar, it was insisted that the said Homestead suit was prosecuted by the Dubuque & Sioux City Railroad company for its own use and benefit in the name of the Iowa Homestead company. That by virtue of the decision in that suit its right to recover the taxes paid by it prior to conveying the lands to the Homestead company, was adjudicated and dedetermined adversely, and that such adjudication was a bar to appellee's right to recover in this action.

The decision of the Supreme Court of Iowa, was that the taxes paid by the Dubuque & Sioux City Railroad company were not mentioned in the pleadings and hence were not sued for in the action brought by the Homestead company, and that so far as that issue was concerned, the Dubuque and Sioux City Railroad company was in no possible sense, a party to that action. It is now claimed, that in deciding the above points, the state court raised a federal question which gives this court jurisdiction of the cause.

ARGUMENT.

III.

In the case of Litchfield against Webster county, 101, U. S. 774 this court had occasion to decide as to the liability of "Des Moines river lands" for the taxes levied by the State of Iowa for the year 1861 and the preceding years 1859 and 1860. It is there said that the United States until the passage of the resolution of March 2nd, 1861 continued to be the proprietor of the lands both in law and equity and that such being the case the lands were not taxable before March 2nd, 1861.

"This" says the court "disposes of the taxes for the years 1859 and 1860, *but another question arises as to those of* 1861. *Under the revenue laws of Iowa in force at that time* government lands entered or located or lands purchased from the state could not be taxed for the year in which the entry location or purchase was made."

Here is a plain and positive declaration on the part of this court that the liability of these lands for the taxes of 1861 depends entirely upon the construction to be given to the revenue laws of the State of Iowa. The fact that the title to the lands remained in the United States till March 2nd, 1861, rendered them untaxable up to that date and involved a federal question that would under proper circumstances give this court jurisdiction. But as to the taxes of 1861 another question arises and is one of purely local jurisdiction. If the state law provides for the taxation of lands entered on or before the 2nd day of March in any year then the lands so entered cannot be exempt on the ground that the title thereto remained in the government till the time of entry or purchase. Whether the law of the state does so provide or not depends entirely upon the meaning or construction to be given to the statutes of the state providing for the raising of revenue. What meaning or construction is to be given to the revenue statutes of a state is necessarily a matter of local jurisdiction and one over which this court has no appellate power or authority whatever.

The note of the reporter appended to the above case of Litchfield against Webster county page 781 is clearly inaccurate; at least so far as it implies that the court held that the claim for the taxes of 1861 raised in any degree a federal question. Such a ruling would have been clearly inconsistent with the position taken by the court in the main case, for there it is expressly held that the taxability of the lands for 1861 depends upon the revenue laws of Iowa in force at that time.

IV.

The appellant's position that the decision of the state court holding the lands liable to taxation for the year 1861, raised a federal question is clearly untenable. Admit that the lands were not subject to taxation while the title remained in the United States, still it cannot be denied that they became taxable the moment the title passed from the government to the appellant,

Stryker. This took place at least as early as the second day of March, 1851. If then, nonliability to taxation till March 2nd, 1861, raised a federal question, it is equally certain that liability after that date raised a question of exclusive state court jurisdiction. But this court is asked to hold that the State of Iowa could not levy or assess taxes upon the lands for the year or for any part of the year 1861, merely because the title was in the government till the 2nd day of March of that year. This court cannot possibly make such a ruling without invading the province of the state courts and usurping a jurisdiction that it does not lawfully possess.

Suppose the legislature had expressly provided that lands obtained or purchased of the United States before the 3rd day of March in any year shall be liable for taxes that year the same as other lands. Could this court on pretense of deciding a federal question declare such a provision of the statute void and of no effect. Most clearly not. For indeed there can be no honest pretense that such a question is one of federal cognizance. And yet the legal effect of the decision of the state court in this suit is nothing more nor less than that under the laws of Iowa land bought of the United States prior to the 3rd day of March in any year is taxable for that year. It may be competent for the courts of the United States to decide that lands shall not be taxed by the state so long as the title thereto remains in the United States, but it is certainly not competent for them to decide that they are not taxable the moment the title passes out of the United States. The appellant asks this court to decide that the lands were not subject to taxation for nearly ten months after the title thereto had been acquired by the appellant. This court has no jurisdiction or legal power to make such a decision.

V.

As before stated the alleged ground of federal jurisdiction is that the lands were not liable to taxation during the period of time intervening between January 1st, and March 2nd, 1861. The claim is made that the state court decided that the lands were subject to taxation during the period above named. But this claim is clearly unfounded. The record does not show that such a point was decided. And as a matter of fact no such question was either raised or decided by the court. Nor was it necessary to decide this question in order to sustain the judgment rendered by the state court. The sole and only point

raised by the record in reference to this matter was that the lands were not liable to taxation for any part of the year 1861, merely because the title thereto was in the United States till the 2nd day of March, 1861.

All that the court decided was that the mere non-liability to taxation till March 2nd, 1861 did not render the lands exempt from taxation for that year and that when the taxes levied for that year were paid in good faith by a person not owning the lands the real owner was bound to repay to him the taxes thus paid. Neither one of these points raised a federal question. To give this court jurisdiction *it must be shown by the record that the state court decided either actually or by necessary intendment that the lands were taxable prior to the 2nd day of March*, 1861. The record shows no such thing. On the contrary it shows that the court simply held that taxes paid by a stranger in good faith for the year 1861 could be recovered from the real owner of the lands.

Furthermore the record shows that the question as to whether the lands were liable to taxation for the year 1861 was not in fact raised except on the application for a rehearing of the suit. The question was raised too lato to give this court jurisdiction.

Steines vs. Franklin county 14 Wall, 15.

VI.

The state court held that the decree in the case of the Iowa Homestead Company against the Des Moines Navigation and Railroad Company dismissing that suit was not a bar to the appellee's claim. The decision of said state court was based upon two grounds. First that neither the appellee nor his assignor the Dubuque and Sioux City Railroad Company was a party to said suit, and second, that the taxes paid by the Dubuque and Sioux City Railroad Company were not sued for in that action and were not mentioned or described in the pleading therein.

The language of the court was as follows: "The claim is that the taxes in question were actually covered by the adjudication in the case of the Iowa Homestead Company against the Des Moines Navigation and Railroad Company. In our opinion this claim cannot be sustained. The taxes in question

were not only no part of the taxes sought to be recovered in that action, but they were not paid by the plaintiff in that action. They were paid by the Dubuque and Sioux City Railroad Company and neither it nor its assignee the present plaintiff was a party to that action. The defendant contends that the Dubuque and Sioux City Railroad Company was substantially a party to that action because the plaintiff in the action claimed a part of the lands by deed of warranty from the Dubuque and Sioux City Railroad Company and notified that company of the pending of the action. The effect howeverof such notification would be only to bind the Dubuque and Sioux City Railroad Company by the adjudication in respect to title. In that the Dubuque and Sioux City Railroad Company was interested by reason of its deed of warranty, but had no interest in the taxes sought to be recovered. So far as the issue was concerned involving a right of recovery for the taxes it was in no possible sense a party. The adjudication in that case then does not operate as a bar in this."

That no federal question is raised by the record in this case is quite apparent. The rule in reference to such cases is very clearly stated by this court in Dupasseur vs Rathereau 21 Wall 134. It is there declared that "where a state court refuses to give effect to the judgment of a court of the United States rendered *upon the point in dispute* and *with jurisdiction* of the case and *the parties* a question is undoubtedly raised which under the act of 1867 may be brought to this court for decision."

Under this rule to give this court jurisdiction it must appear upon the face of the record that the judgment pleaded in bar was upon the same point that is in issue in the second suit and that the action in both instances is between the same parties or privies.

For illustration suppose the appellant in this case had set up the judgment rendered in the celebrated Dred Scott case and claimed immunity from the appellee's claim by reason thereof. Would a decision against such immunity raise a federal question that would give this court jurisdiction. If so then it is clear that a defendant in any suit whatever can raise an issue that will enable him to bring his case to this court and obtain such delay as he may desire. But such is clearly not the law. The conclusive reason would be that the appellee was in no

sense a party to the Dred Scott suit and the points in issue in that case are not the same as in this. The state court in deciding these points would be deciding matters of general law and not questions of a federal character. It is only where the state court refuses to give effect to a judgment of a court of the United States rendered upon the point in dispute and with jurisdiction of the case and of the parties that the federal court can take cognizance of the suit and review the decision of the state court. No such question arose in this suit. The judgment pleaded in bar was not upon the same point in dispute nor was it in a suit to which appellee was a party.

Dupasseur vs. Rathereau 21 Wall 134.

All of which is respectfully submitted.

GEORGE CRANE,

Attorney for Appellee.

MOTION TO AFFIRM.

It is claimed by the plaintiff in error that the Homestead suit was prosecuted by the Dubuque & Sioux City Railroad Company for its own benefit, and that as a consequence the railroad company is estopped by the decree in the case to the same extent it would have been if it had been a party on the record. The truth is the railroad com'y was not a party to that suit and had no interest whatever in its result except as to the title to the land. The railroad company, having given the Homestead company a deed of general warranty for the lands, and having received proper notice of the pendency of the suit was bound to defend the title. As to the question of ownership of the lands we have no doubt therefore that the decree therein rendered, assuming it to be valid, was final and binding upon the railroad company.

The same is perhaps true as to the taxes actually therein sued for; at least as regards any claim made by, through or under the Homestead company.

But the taxes sought to be recovered in *this* action were not sued for in the Homestead suit; they were not mentioned, described or referred to in the pleadings in that case. The taxes sought to be recovered in *that* case were taxes *paid by the Homestead company*, while the taxes sued for in *this* case are the taxes *paid by the Dubuque & Sioux City Railroad Company*.

To illustrate, suppose thedefendant had given the Homestead company a promissory note for the amount of taxes paid by that company, and also a promissory note to the railroad company for the amount of taxes it had paid. In an action on the former note how would it be possible for a court of justice to adjudicate the rights of the railroad company under the note given to it. According to any known rule of jurisprudence it certainly would not be possible. The only allegation in the petition in the Homestead suit on which the right to recover the taxes was based was the following:

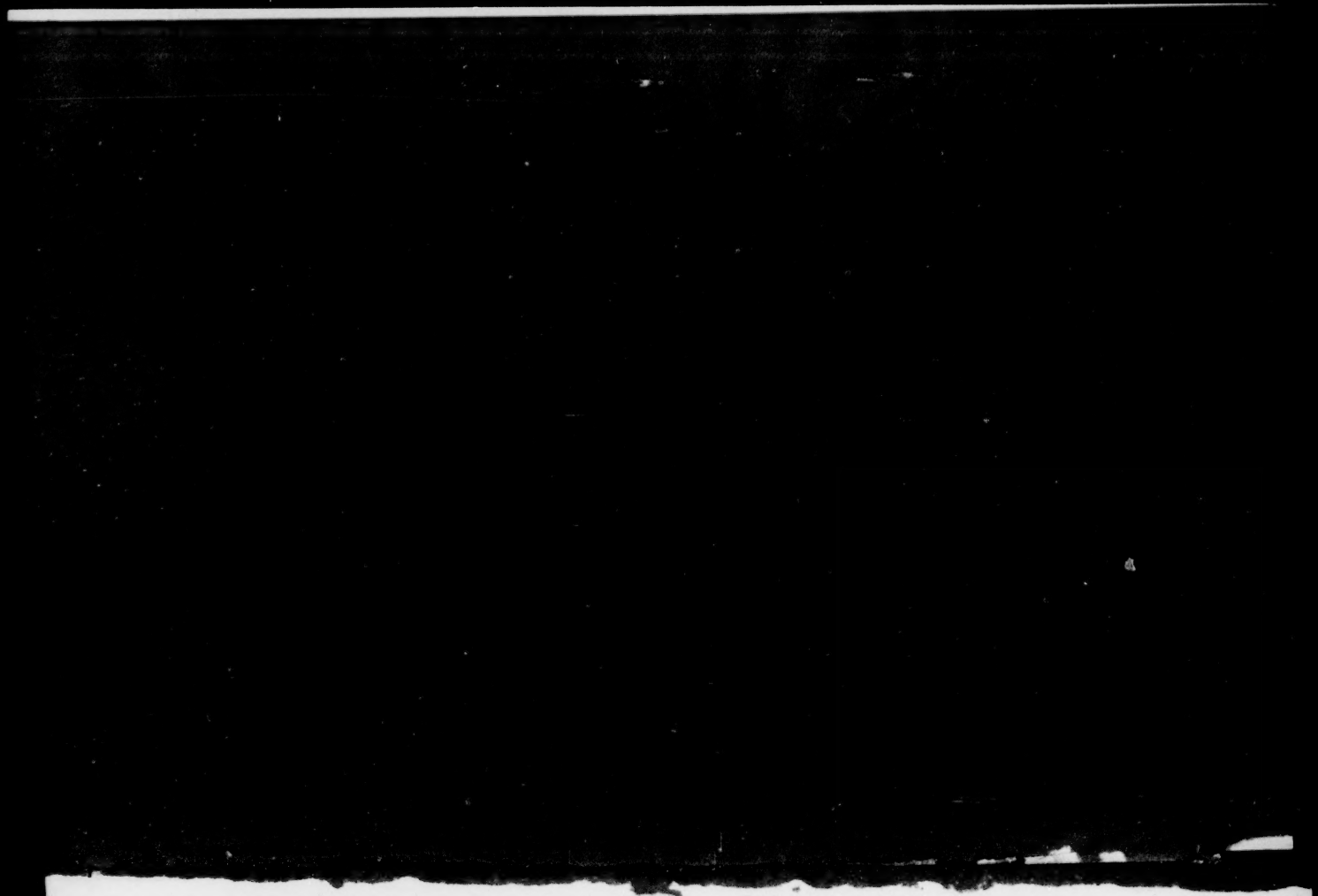
"The said plaintiffs have been in possession of the lands claimed by them, themselves or their vendees in contract since 1861. They have paid the taxes thereon to the state of Iowa since, in all amounting to $80,000, and if their title has failed they are entitled to have their taxes refunded since 1861, by the holder of the legal title who has not paid them."

The only taxes sued for in that case were the taxes paid by the plaintiff, the Homestead company. Had the court in that case held the taxes recoverable evidence of the payment of taxes made by the Dubuque & Sioux City Railroad Co. would not have been revelant or competent under the forgoing allegation. That allegation had reference *solely* to taxes paid by the plaintiff, the Homestead company, and not to taxes paid by the railroad company. The taxes claimed in this action could not possibly have been recovered in the Homestead suit under the pleadings as they stood; as the railroad company could not have obtained a judgment in its favor, it cannot be prejudiced by the decree or judgment rendered.

It is also true that the railroad company was in no sense a party to that suit so far as the contest about the taxes was concerned. Not being a party it cannot be bound by any adjudication made in reference thereto.

Should the court conclude to overrule the motion to dismiss the writ of error, we insist that for the reasons above stated, the decree of the state court ought to be afirmed.

GEO. CRANE.



The only taxes sued for in that case were the taxes paid by the plaintiff, the Homestead company. That the court in that case held the taxes recoverable, evidence of the payment of taxes made by the Dubuque & Sioux City Railroad Co. would not have been relevant or competent under the forgoing allegation. That allegation had reference solely to taxes paid by the plaintiff, the Homestead company, and not to taxes paid by the railroad company. The taxes claimed in this action could not possibly have been recovered in the Homestead suit under the pleadings as they stood; as the railroad company could not have obtained a judgment in its favor, it cannot be prejudiced by the decree or judgment rendered.

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GEO. CRANE.

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SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1884.

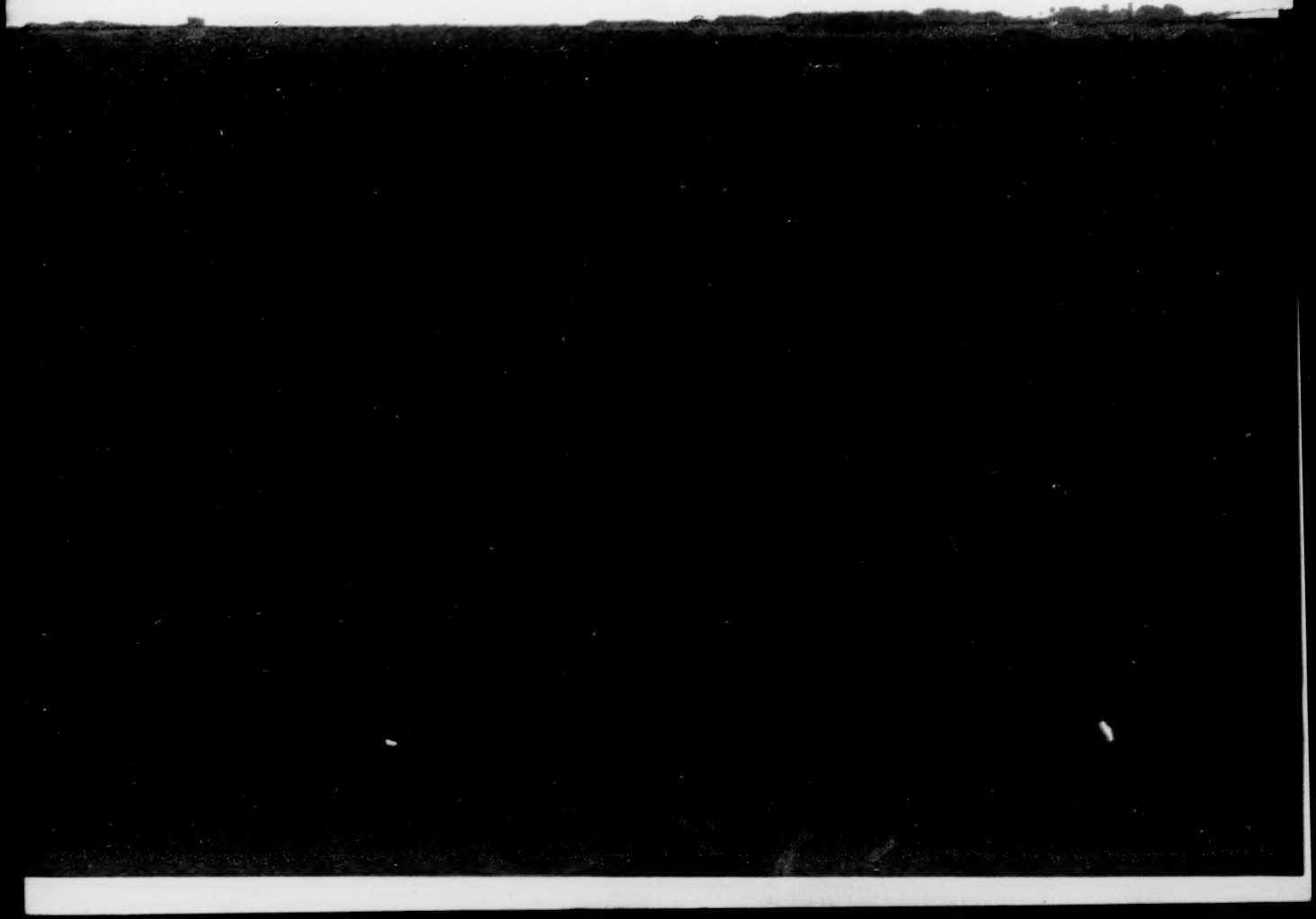
NO. ~~961.~~ 45

JOHN STRYKER, *Plaintiff in Error.*
vs.
EDWARD K. GOODNOW, *Defendant in Error.*
} On Error from Supreme Court of Iowa.

Reply to Argument of Counsel for Plaintiff in Error on Motion to Dismiss Writ of Error.

C. H. GATCH, for Plaintiff in Error.
GEORGE CRANE, for Defendant in Error.

DEFENDANT'S BRIEF.



SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1884.

NO. 961.

JOHN STRYKER, *Plaintiff in Error*,
vs.
EDWARD K. GOODNOW, *Defendant in Error*.

On Error from Supreme Court of Iowa.

C. H. GATCH, for Plaintiff in Error.
GEORGE CRANE, for Defendant in Error.

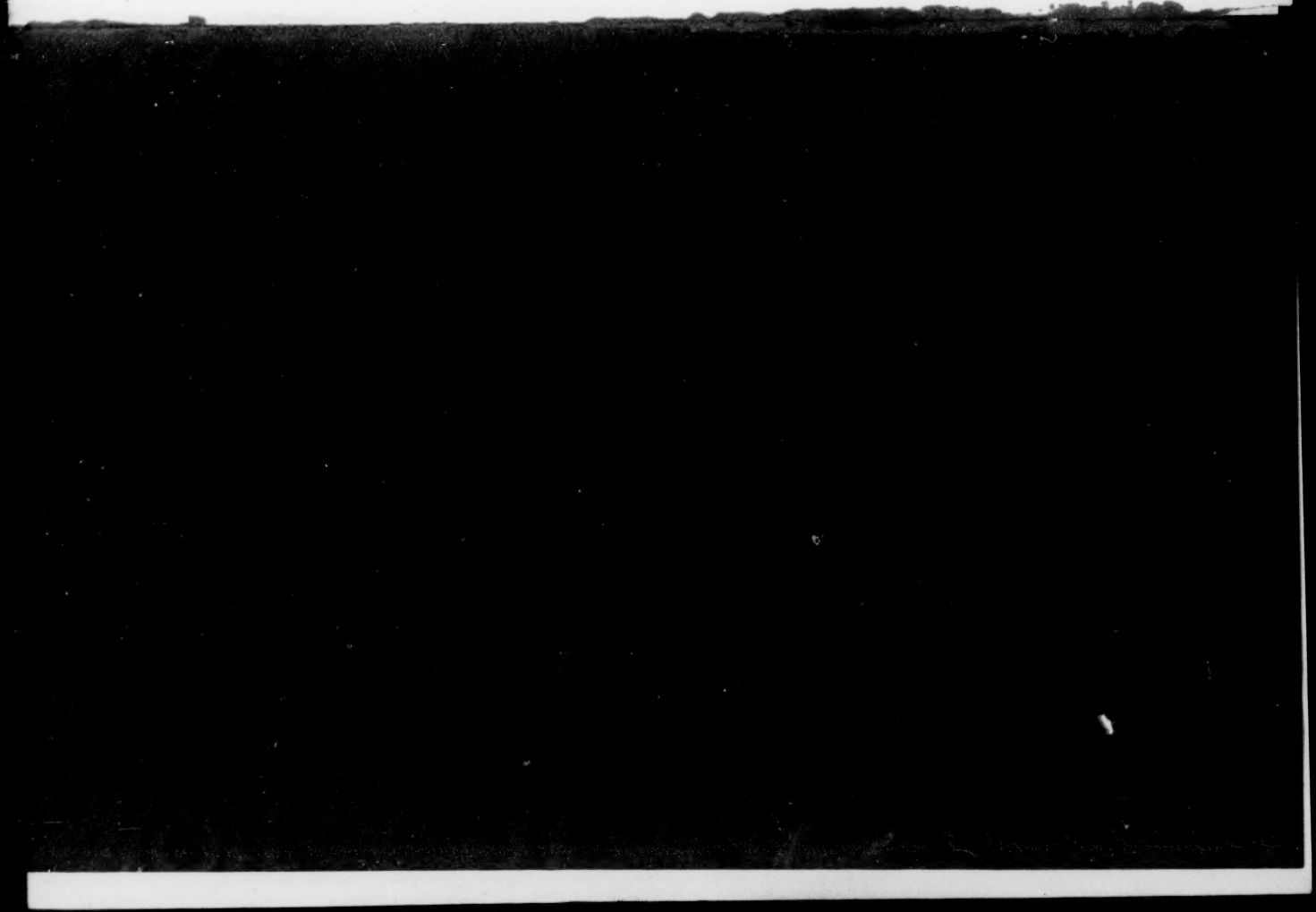
Reply to Argument of Counsel for Plaintiff in Error on Motion to Dismiss Writ of Error.

I.

There are some principles of law that are recognized by all the text writers and are never questioned by the courts. We here state some of them.

'The request which is necessary to support an executed consideration, if it has not been made in express terms will be implied in the following circumstances.

First. Where the consideration consists in the plaintiff having been compelled to do that to which the defendant was legally compellable.



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I.

There are some principles of law that are recognized by all the text writers and are never questioned by the courts. We here state some of them.

'The request which is necessary to support an executed consideration, if it has not been made in express terms will be implied in the following circumstances.

First. Where the consideration consists in the plaintiff having been compelled to do that to which the defendant was legally compellable.

Secondly. Where the defendant has *adopted and enjoyed the benefit of the consideration*: for here his subsequent assent amounts to a *ratihabitio* and such ratification may be relied on as evidence of a previous request. And,

Thirdly. When the plaintiff voluntarily does that to which the defendant was legally compellable and the defendant afterwards in consideration thereof *expressly promises.*"

It is not denied that the defense of former adjudication was made in this case. And in avoidance thereof the defendant in error insisted that it was of no validity for the reason that the court had no jurisdiction of the suit, the record therein showing that the plaintiff and defendant were citizens of the same state.

But the state court decided the case in favor of the plaintiff, expressly on the ground that the evidence showed that subsequent to the alleged adjudication the plaintiff in error took advantage of or ratified the act of payment, and thereby impliedly promised to repay the said taxes.

The question thus decided by the state court was clearly one of general law, and not of a federal character.

All that this court expressed an opinion upon (it had no jurisdiction to adjudicate anything,) was that under the facts therein presented and existing at that time there was no debt or liability. It was clearly not competent for this court to decide that there never would be any liability. The state court conceded full force and effect to the judgment of this court, and assumed that there was no debt or liability under the facts existing at the time the judgment of this court was rendered.

To illustrate further, suppose the plaintiff in error, after the decision in the Homestead suit had given to the defendant in error his promissory note for the amount of the taxes paid and interest. Suppose also that the state court had decided that such note was founded upon a valid consideration, and therefore binding. Would it be contended that such a ruling would involve a federal question? Most certainly not. In the case at bar, the subsequent promise was implied and not expressed. but this difference is of no moment, in connection with the

question of federal jurisdiction. In both instances the decision of the state court is upon matters of general law only, and in both instances full force and effect is given the decision of the federal court.

Now it may be assumed that at the time this court rendered its decision in the case there was no cause of action. At that time all the facts necessary to complete the right to recover had not transpired. Up to that date the payments were merely voluntary, and did not constitute the basis of a valid obligation against the owner of the lands. At least, therefore, one fact essential to the right of recovery did not then exist. The fact thus wanting was the recognition and taking advantage of the payments. Until this occurred the bringing of the suit was premature. Of course a judgment on an action prematurely brought cannot be a bar to an action brought after the cause thereof has become complete. The position of the adverse counsel is in effect directly the opposite. He is asking this court to take cognizance of this case and reverse the decision of the state court by deciding that that court could not base a right of recovery upon a subsequent implied or express promise, because to do so would be to refuse to give effect to this court's decision in the Homestead suit. This court has no power to take jurisdiction of this case merely to decide that there was no subsequent promise, or that such promise was of no validity. These are clearly matters of general law. Hence the only ground upon which this court can take cognizance of the case, is that the state court was bound to treat the judgment of this court upon the facts existing in 1872, as an adjudication upon all subsequent promises, either express or implied. Such a position is clearly untenable.

The counsel for the plaintiff in error says that the issue of a new promise was not in the case, whether it was or not is a question of pleading. The state court held that the pleading was sufficient to raise the issue and that the evidence established the new promise. But what have these matters to do with the question of jurisdiction? Clearly nothing.

II.

Another ground upon which jurisdiction is claimed in this case is that the state court decided that the statute of limitations did not begin to operate when the court decided the Wolcott

and Burr cases, reported in 5 Wall. 581. The ruling of the state court was that the Iowa Homestead suit was carried on in good faith, notwithstanding the decision in the above cases, and that therefore the payment of the taxes sued for, was not officious. The truth is, the Homestead company had no interest in the Wolcott and Burr cases whatever, nor in the lands in controversy therein. The only effect that the judgments in those cases could have, was to establish the title to the lands involved in the suits in one of the parties thereto. That full force and effect were given to said judgments, cannot be denied. As the state court was not called upon in this suit to give effect to said judgments, it was not possible for it to refuse to give them effect. Without further argument, we submit the case.

GEORGE CRANE,

Attorney for Defendant in Error.

and Burr cases, reported in 5 Wall. 881. The ruling of the state court was that the Iowa Homestead suit was carried on in good faith, notwithstanding the decision in the above cases, and that therefore the payment of the taxes sued for was not collusive. The truth is, the Homestead company had no interest in the Walker and Burr cases whatever, and no title in controversy therein. The only effect that the judgments in these cases could have was to establish the title to the lands involved in the suits in one of the parties thereto. That full force and effect were given to said judgments cannot be doubted. As the state court was not called upon in this suit to give effect to said judgments, it was not possible for it to refuse to give them effect. Without further argument, we submit the case.

GEORGE CRANE,

Attorney for Defendant in Error.

No 964
43

Office Supreme Court U. S.
FILED.
OCT 17 1884
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CLERK.

IN SUPREME COURT OF THE UNITED STATES.

JOHN STRYKER, *Plaintiff in Error*,

vs.

EDWARD K. GOODNOW, *Defendant in Error*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

On Motion to Dismiss Writ of Error.

C. H. GATCH, for Plaintiff in Error.

GEO. CRANE, for Defendant in Error

DEFENDANT'S BRIEF.

IN SUPREME COURT OF THE UNITED STATES.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

C. H. GATCH, for Plaintiff in Error.

GEO. CRANE, for Defendant in Error

Argument on Motion to quash Writ of Error.

I.

From 1864 to 1873, the title to what are known as the "Des Moines River lands" in Webster County, state of Iowa, was in dispute between different claimants thereto. The Iowa Homestead company claimed the title under an act of congress approved May 15th, 1856, granting lands to the state of Iowa to aid in building certain railroads in that state. The Des Moines Navigation & Railroad company and its grantees claimed the ownership of the same lands under an act of congress, approved August 8th, 1846, granting lands to the territory of Iowa, to aid in the improvement of the navigation of the Des Moines River. In 1868 the Homestead company commenced suit against the Des Moines Navigation &Railroad company, and its grantees to establish title to said lands, and as alternative relief asked in case of failure to obtain the title to have judgment against the several defendants for the taxes which it had paid upon the

lands during the continuance of the controversy. This suit was commenced in the District Court of Webster County, Iowa, and was then transferred to the Circuit Court of the United States for Iowa. At the final hearing in the Circuit Court the petition was dismissed. On appeal to this court the decision below was affirmed, and the right to recover the taxes paid was denied.

Under the rulings of the Supreme Court of Iowa taxes paid under the circumstances above stated, can be recovered from the successful litigant.

In the case at bar it was claimed that the decree in the said Homestead suit was a bar to the right to recover in this action. In reply to this point the defendant in error insisted that long subsequent to the decree in the Homestead suit, the plaintiff in error took advantage of the payment of taxes made by said company, and thereby became liable on a new implied promise. After the commencement of this suit, Webster county filed a petition alleging that the taxes on Stryker's lands had not been paid and asking judgment against him for the amount thereof. To defeat the claim of the county, Stryker the plaintiff in error, set up, as a defense, the payment of the taxes made by the Homestead company. The state court held that this constituted a recognition of the act of payment by the Homestead company, and laid the basis for an implied promise, to repay to said company, the amount of taxes so paid by it. The Iowa Homestead company assigned and transferred its claim for said taxes paid on the lands of said Stryker to Goodnow the defendant in error. The decision of the state court holding that the recognition of the payment, raised a new promise is the first ground on which the plaintiff in error claims jurisdiction for this court.

II.

The second point urged as giving this court jurisdiction is, if possible, more unfounded than the first. Under the law of Iowa, where one party pays the taxes upon the land of another, in order to recover them from the owner, it is sufficient to show that the payments were made in good faith and not *officiously*. In the case at bar, the state court held that the taxes sued for were not paid officiously.

As long as the Homestead company carried on the litigation in good faith and under the sincere belief of ownership in itself, the right to pay the taxes and in case of defeat, recover them back from the other party continued. And of course during such *bona fide* litigation no cause of action accrued to the Homestead company to recover the taxes paid.

The Supreme Court of Iowa decided that the controversy about the above lands was carried on in good faith till April, 1873, when the opinion of this court, in the said Homestead suit was delivered.

In the case of Wolcott vs. the Des Moines Navigation & Railroad company 5 Wall. 681, decided by this court in 1867, the same ruling was made as to the ownership of the so called Des Moines River lands that was subsequently made by this court, in the Homestead suit above mentioned. But in the Wolcott suit both parties were claimants under the act of 1846 and hence interested in defeating the claim of the Homestead company under the act of 1856. After the Wolcott case was appealed to this court counsel for the Homestead company was permitted to argue the questions raised by the record as made by the parties to that suit.

But notwithstanding the above permission and the ruling of this court in that case, the Supreme Court of Iowa held that in as much as the Homestead company was not a party to that action, the decision therein was not conclusive proof that the subsequent suit by the Homestead company against the Des Moines Navigation & Railroad company was carried on in bad faith.

In fact the decision in the Wolcott case had no bearing upon the issues in the suit now before this court, except so far as it tended to show that the Homestead suit was prosecuted in bad faith, and hence that the payment of the taxes after 1866 was officious.

The argument of appellant is this: The decision in the Wolcott case in 1867, finally settled the question of title to the lands. Any litigation after that about title was in bad faith, and any payment of taxes after that was officious. That the cause of action arose the moment that the payments became officious or when the Wolcott case decided in 1867. That the laws of

Iowa provide that a cause of action against a non-resident is barred in that state when barred by the law of the state where the defendant resides, that the defendant in this suit was a citizen of New York, where a cause of action like the one in this suit is barred in six years, and that therefore this suit having been commenced in 1880, and more than six years after the decision in the Wolcott case, was barred by the statute of limitation of New York.

The Supreme Court of Iowa held that the decision in the Wolcott case was not final or conclusive upon the Homestead company, and that notwithstanding such decision, the subsequent suit by the Homestead company was prosecuted in good faith, and that the payment of taxes after that decision was not officious and therefore the New York statute was not a bar to this action.

ARGUMENT.

III.

Since the passage of the amendatory act of February 5, 1867, the old rule that forbade this court to examine state court opinions to ascertain what had been decided, has been abrogated. That rule was founded upon a proper construction of a statute and not upon its own merits or wisdom. In a great many cases it is doubtless an easy matter for this court to determin just what has been decided by the state courts from an examination of what strictly speaking constitutes the record of a case. On the other hand, however, there are many cases where it would be impossible to do so. This difficulty has heretofore to some extent been obviated by certificates of the presiding judges showing what questions had been decided. A moment's reflection will show that such certificates are often less reliable than the opinions. They are frequently signed by the chief justice of the state court months after the opinion has been delivered, and hence rest solely upon his memory or recollection as to what transpired, or more truthfully speaking as to what is contained in the opinion itself. Our position in this regard is fortified by our own experience in the cases now in this court.

But we understand that it is now an established practice of this court to examine the opinions of the state courts to ascertain the points decided. In the case of Murdock vs. Memphis, 20 Wall. 633 this language is used:

"The ommitted clause of the act of 1789, declared that no other error should be regarded as ground of reversal than such as appears on the face of the record and immediately respects the before mentioned questions.

It is probable that in determining whether one of those questions was actually raised and decided in the state court, this court has been inclined to restrict its inquirles too much by this express limitation of the inquiry 'to the face of the record.'

What was the record of a case was pretty well understood as a common law phrase at the time that statute was enacted. But the statutes of the states and the new modes of proceedings in those courts have changed and confused the matter very much since that time. It is in reference to one of the necessities thus brought about that this court long since determined to consider as part of the record, the opinion in such cases by the Supreme Court of Lousiana. And though we have repeatedly decided that the opinions of other state courts cannot be looked into to ascertain what was decided, we see no reason why, since this restriction is removed we should not so far examine those opinions when properly authenticated, as may be useful determining that question. We have been in the habit of receiving the certificate of the court signed by its chief justice, or a presiding officer, on that point, though not as conclusive, and these opinions are quite as satisfactory and may more properly be treated as part of the record than such certificates."

Murdock vs. Memphis, 20 Wall. 633.
McManus vs. Sullivan, 91 U. S. 575.

The opinion of the state court shows conclusively that in disposing of the defense of former adjudication no question of federal connizance was decided. On this point that court used this language:

"The defendant pleaded as one of his additional defenses that the plaintiff's right of recovery is barred by a prior adjudication, to wit an adjudication in the case of the Iowa Homestead company vs. Des Moines Navigation & Railroad company reported in 17 Wall. 153. To this plea the plaintiff replies in substance, that if it should be conceded that the court made an adjudication in that case, denying a right of recovery for the taxes in question in this case; yet this action is not barred because a right of recovery has arisen since that time. The fact relied upon as giving such right of recovery, is that defendant now claims as he did notthen, the benefit of the payments made by the Homestead company. After this action was instituted, a petition was

filed in the case of Webster county, averring among other things, that the taxes in question had never been paid by any one, and that the same are now due to the county from the defendant. To this petition, the defendant answered, averring 'that all of said taxes mentioned in said petition were duly paid by the Iowa Homestead company, * * * and said defendant is no longer liable therefor.' The question presented is as to whether if the payments in the first instance were officious, as we may assume, was held and defendant for that reason was not liable, the subsequent adoption of the payments for the purpose of escaping liability to the county, should be regarded as an adoption of the payment as between the defendant and plaintiff.

If the plaintiff's assignor had made the payments in the name of the defendant as his assumed agent, any act of the defendant indicating an intention to claim the benefit of the payments, would constitute a ratification of the acts by which the payments were made. But the defendant contends that the case is different where a person pays another person's debt not under a claim of acting for such person; but under the mistaken supposition that the debt is due from himself. The defendant's position is that in such case, there is no act of assumed agency to ratify.

It must be conceded we think, that in one sense this is so. The plaintiff's assignor did not hold himself out as the defendant's agent Nevertheless when the defendant claims the benefit of the payments he elects to treat the acts of payment as done for himself. Having elected to so treat the acts, he ought not to complain if the court treats them in the same way. Natural justice certainly requires that if the defendant *has the benefit of the payments as discharging his liability to the county, he should reimburse the plaintiff* whose assignor made the payments. * * * But if he chooses not to ignore, but to claim the benefit of it, we see no reason why we may not regard him as treating the act of payment as done for him; and if we do so regard him *there is no difficulty in finding an implied promise* to reimburse the payor his assignee."

It is will be observed that the state court rests its opinion as to the liability for the taxes paid upon a promise made after the decision in the Homestead suit was rendered. It is not therefore possible that the question could have been adjudicated in that suit.

The certificate signed by the chief justice in this case shows that the plaintiff in error claimed immunity from the demand on the alleged ground that the question of liability had been adjudicated in his favor in the Homestead suit, and that the decision of the state court was against such immunity. In a sense this

is correct. But the truth is the court decided against the immunity on the ground that the promise on which the liability depended was made after the Homestead suit was determined. The certificate is really not in conflict with the position.

The question whether the circumstances were such as to justify the state court in implying a new promise is one relating exclusively to general law and involves no question of federal cognizance.

New York Ins. Co. vs. Hendren, 92 U. S. 286.

Kennebec R. R. Co. vs. R. R. Co. 14 Wall. 25.

Gibson vs. Chontean, 8 Wall. 314.

IV.

The second ground set forth in the certificate on which to sustain the jurisdiction of this court is entirely insufficent. It in no sense raises a federal question. The decision in the Wolcott case referred to in the certificate has no bearing upon any issue in the case at bar except so far as it tends to show that the payment of the taxes after the opinion in that case was announced were made in bad faith or officiously, and that the statute of limitations began to operate at that time. These are clearly not questions of federal cognizance.

New York Ins. Com. vs. Hendren 92 U. S. 286.

Marquez vs. Bloom 16 Wall 351

Whether a cause of action is barred or not is a question of local jurisdiction.

All of which is respectfully submitted.

GEORGE CRANE.

Att'y for Appelle.

23-5
123-5-24
WITHDRAWN

SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1886.

NO. ~~318~~ 113

THOMAS STRYKER, *Adm.*,

Plaintiff in error.

vs.

GEORGE CRANE, *Adm.*,

Defendant in Error.

On Error from Supreme Court of Iowa.

C. H. GATCH

For Plaintiff in error.

GEORGE CRANE

For Defendant in error.

DEFENDANT'S BRIEF.

23-3
123-3-24
WITHDRAWN

SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1886.

NO. ~~318~~ 413

THOMAS STRYKER, *Adm.*,

Plaintiff in error.

vs.

GEORGE CRANE, *Adm.*,

Defendant in Error.

On Error from Supreme Court of Iowa.

C. H. GATCH

For Plaintiff in error.

GEORGE CRANE

For Defendant in error.

DEFENDANT'S BRIEF.

SUPREME COURT OF THE UNITED STATES. OCTOBER TERM. 1886.
NO. 318

THOMAS STRYKER, *Adm.*,
Plaintiff in error.
vs.
GEORGE CRANE, *Adm.*,
Defendant in Error.

On Error from Supreme Court of Iowa.

C. H. GATCH
For Plaintiff in error.
GEORGE CRANE
For Defendant in error.

STATEMENT.

The facts in this case are substantially the same as in the preceeding case, except thetaxes were all paid after the government had parted with its title. It further appears in this case, that after the commencement of this suit, Webster County, intervened therein and asked jugdment against John Stryker for the taxes levied upon his lands during the controversy about the title. Stryker set up in defense that the taxes had been paid by the Iowa Homestead company. In this manner and to this extent he took advantage of and recognized the payment of the taxes by the Homestead Company.

The two defenses relied upon as involving federal question are set out in the following certificate by the Supreme Court of Iowa:

"And now on the application of the defendant John Stryker, it is certified by the court here and ordered to be made part of the record herein, that by the answer of defendant, in defendant's assignment of errors in the additional abstract, and on the hearing in the said cause, the defendant claimed immunity from the entire demand and claim of plaintiff, on the ground that, as he claimed the same demand and claim had been adjudicated against plaintiff's assignor, the Iowa Homestead Company by the Supreme Court of the United States in the case of The Iowa Hmestead Company against The Des Moines Navigation and Railroad Company this defendant and others at the October Term thereof A. D. 1872, and that our decision herein was and is, against the immunity claimed by defendant.

And it is further certified and ordered to be made part of the record herein that by defendants answer and on the hearing in said cause, defendant claimed immunity from said entire claim and demand, because, as was claimed, the alleged cause of action not having accrued within six years immediately preceding the commencement of the action, was barred by the New York Statute of Limitations, and that to determine whether or not it was so barred it became material and necessary to decide whether or not the decision of the Supreme Court of the United States in the case of Sam'l G. Wolcott vs. The Des Moines Navigation and Railroad Company, was a final determination of the question therein decided, in order to determine when the plaintiff's cause of action accrued, and that our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed because of our said decision that said determination was not final."

ARGUMENT.

I

Our first reply to the defense of former adjudication is that the record in the Homestead suit showed *affirmatively* that the Des Moines Navigation and Railroad Company was a citizen of the same state with the plaintiff in that suit; that said

company was an indespensible party to the suit brought, and hence that the federal courts had no jurisdiction to make a valid determination of any issues involved therein.

SHAINWALD v s. LEWIS 108 U. S. 158.

CAMERON vs. MCROBERTS 3 WHEATON 591

R. R CO. vs. SWAN 111 U. S. 385.

OBERLY vs. GALLAGER 93 U. S. 201

II

In the next place we say that the federal court being without jurisdiction, as shown by the face of the record, it was in duty bound to dismiss the cause without any attempt to decide the issues raised. The bill having been dismissed the presumption is that the dismissal was for want of jurisdiction. On this point we refer to our argument in the preceding case.

III

Under the Statutes of Iowa the opinions of the Supreme Court of the state become part of the records in the cases decided. The language of the statute of Iowa is as follows:

Sect. 146. The office of the Clerk of the Supreme Court shall be kept at the seat of government and he shall keep a complete record of all proceedings of the court.

Sect. 149. He shall record every opinion rendered by the court as soon as filed.

It follows that this court in suits brought from the Supreme Court of Iowa, can examine the opinions of that court for the purpose of ascertaining what has been decided theresn.

JACKS vs. HELENA 115 U. S. 288.

MURDOCK vs. MEMPHIS 20 WALL 590.

ADAMS CO. vs. R. R. CO. 112 U. S. 123

The opinion of the state court shows conclusively that in disposing of the defense of former adjudication no question of federal connizance was decided. On this point that court used this language:

"The defendant pleaded as one of his additional defenses that the plaintiff's right of recovery is barred by a prior adjudication, to wit an adjudication in the case of the Iowa Homestead company vs. Des Moines Navigation and Railroad company reported in 17 Wall. 153. To this plea the plaintiff replies in substance, that if it should be conceded that the court made an adjudication in that case, denying a right of recovery for the taxes in question in this case; yet this action is not barred because a right of recovery has arisen since that time. The fact relied upon as giving such right of recovery, is that defendant now claims as he did not then, the benefit of the payment made by the Homestead company. After this action was instituted, a petition was filed in the case by Webster county, averring among other things, that the taxes in question had never been paid by anyone, and that the same are now due the county from the defendant. To this petition, the defendant answered, averring "that all of said taxes mentioned in said petition were duly paid by the Iowa Homestead company. * * * and said defendant is no longer liable therefor." The question presented is as to whether, if the payments in the first instance were officious as we may assume, was held and defendant for this reason was not liable, the subsequent adoption of the payments for the purpose of escaping liability to the county, should be regarded as an adoption of the payment as between the defendant and plaintiff.

If the plaintiff's assignor had made the payments in the name of the defendant as his assumed agent, any act of the defendant indicating an intention to claim the benefit of the payments, would constitute a ratification of the acts by which the payments were made. But the defendant contends that the case is different where a person pays another person's debt not under a claim of acting for such person; but under the mistaken supposition that the debt is due from him self. The defendant's position is that in such case, there is no act of assumed agency to ratify.

It must be conceded we think, that in one sense this is so. The plaintiff's assignor did not hold himself out as the defendant's agent. Nevertheless when the defendant claims the benefit of the payments, he elects to treat

the acts of payments as done for himself. Having elected to so treat the acts, he ought not to complain if the court treats them in the same way. Natural justice certainly requires that if the defendant has the benefit of the payments as discharging his liability to the county, he should reimburse the plaintiff whose assignor made the payments. * * * But if he chooses not to ignore, but to claim the benefit of it, we see no reason why we may not regard him as treating the act of payment as done for him; and if we do so regard him, there is no difficulty in finding an implied promise to reimburse the payer or his assignee."

It will be observed that the state court rests its opinion as to the liability for the taxes paid upon a promise made after the decision in the Homestead suit was rendered. It is not therefore possible that the question could have been adjudicated in that suit.

This view is sustained in the most explicit manner by this court, in Linton vs. Stanton, 12 How. 426, a case that is strictly analogous in every essential feature to the case at bar. In that case the plaintiff sued the defendant on certain promissory notes. The defendant set forth as a defense to the claim a discharge in bankruptcy subsequent to the making of the notes. The plaintiff replied that after the discharge in bankruptcy, the defendant promised orally and in writing to pay the notes. The Supreme Court of Louisiana held that the subsequent promise to pay the notes was valid and binding, notwithstanding the discharge by the bankrupt court.

In determining the question of jurisdiction this court said:

Nor has this court the power to examine into the other question which appears to have arisen as to the legal effect of certain promises which the defendant is alleged to have made after he obtained his certificate in the bankrupt court. The legal obligation of such promises depends upon the laws of the state, in which they are made; and in a suit in a state court, the decision of that question by the highest tribunal of the state cannot be reviewed in any court of the United States.

Linton vs. Stanton 12 How. 426.

Adams Co. vs. R. R. Co. 112 U. S. 123.

To illustrate further, suppose the plaintiff in error, after the decision in the Homestead suit, had given to the defendant in error his promissory note for the amount of the taxes paid and interest. Suppose, also, that the state court had decided that the note was founded upon a valid consideration, and therefore binding. Would it be contended that such a ruling would involve a federal question? Most certainly not. In the case at bar, the subsequent promise was implied and not expressed, but this difference is of no moment in connection with the question of federal jurisdiction. In both instances the decision of the state court is upon matters of general law only, and in both instances full force and effect is given to the decision of the federal court.

Again it may be assumed that at the time this court rendered its decision in the Homestead suit, there was no cause of action. At that time all the facts necessary to complete the right of recovery had not transpired. The fact thus wanting was the recognition of the payment, the *adoption* and *enjoyment of the benefit of the consideration.* Until this occurred the bringing of the suit was premature. Of course a judgment in an action prematurely brought cannot be a bar to an action brought after the cause thereof has become complete. The position of the adverse counsel is directly the opposite. He is asking this court to take cognizance of this case and reverse the decision of the state court by deciding that that court could not base a right of recovery upon a subsequent implied or expressed promise because such promise is based upon an *executed consideration* that this court had previously held insufficient to support an action independent of such promise. In other words, counsel's position is that the state court was bound to treat the judgment of this court in 1872, as an adjudication upon all subsequent

promises, either expressed or implied.

Freeman on Judgments, 368.

Hurst vs. Means, 2 Sneed, 549.

IV

The question whether the circumstances were such as to justify the state court in implying a new promise, is one relating exclusively to general law and involves no question of federal cognizance.

New York Ins. Co. vs. Hendren, 92 U. S. 286.

Kennebec R. R. Co. vs. R. R. Co. 14 Wall 25.

Gibson vs. Chonteon, 8 Wall, 314.

It is claimed by the plaintiff in error that the question whether there was a ratification of the payment, is not raised by the pleadings. It is a sufficient answer to this point to say that the state court held that the question was properly before it, and that the pleadings were sufficient. Even if the state court committed an error in holding the pleadings sufficient to raise the question, it is not a matter that this court can review. It was perfectly competent for the state court to admit evidence occurring after the commencement of the suit to prove up the issues raised by the original pleadings. An error in this regard would not raise a federal question. In short, the state court having decided that an implied promise was sufficiently pleaded, and fully proved by the evidence, this court clearly has no authority to review the questions thus decided.

Murdock vs. Memphis, 20 Wall. 633.

New York Insurance Co. vs. Hendren, 92 U. S. 286.

1. The second ground of defense relied upon by the plaintiff in error is that the cause of action was barred by the statute of limitations of the state of New York. The plaintiff in error has always been a resident of that state, and by the laws thereof a cause of action arising upon an implied promise is barred in six years. In the state of Iowa the statute bar of other states in some instances is made effective in this state. Thus, in the Revision of 1860, section 2746, it is provided that:

"When a cause of action has been fully barred by the laws of any country where the defendant has previously resided such bar shall be the same defense here as though it had arisen under the provisions of this chapter."

By an act of the legislature, approved in April, 1870, the foregoing provision was amended by adding thereto the following, to-wit:

"But this section shall not apply to causes of action arising within this state."

Chap. 167 of Laws of 1870.

The claim for the taxes in this case is clearly a cause of action arising within this state, and falls literally within the above-named amendment to the section giving force to foreign acts of limitation, unless, therefore, the bar of the New York statute had fully accrued before the taking effect of the above amendment in 1870, the cause of action is not barred by that statute. The taxes sought to be recovered in this suit were all paid in the year 1865 and in years subsequent to that date, and, therefore, could not have been fully barred by the six years' limitation of the statute of New York at the time

the legislature of Iowa in 1870 approved the amendment to to the limitation laws of this state.

The claim for the taxes being a cause of action arising within this state, the limitation statute of New York ceased to apply to it in 1870.

Goodnow vs. Stryker, 62 Iowa 224.
Higgins vs. Mendenhall, 42 Iowa 675.

But whether it had such application or not is a question of law to be determined by the state court, and one with which this court has nothing to do whatever.

2. In the next place it is claimed that the effect of the judgment of this court in the case of Wolcott vs. The Des Moines Navigation Company, 5 Wall 681, was to put the statute of limitations of New York into operation and to create a bar to the claim sued upon, and that the Supreme Court of Iowa committed an error in not giving to that judgment the effect thus claimed for it. This strange proposition of law is thus stated by the opposite counsel, Arg. 17:

"The court having thus in effect made the question of defendant's liability to depend upon the time of the termination of the litigation by which the title was adjudicated to be in defendant, the ultimate and precise question as SHOWN BY THE CERTIFICATE as above quoted, upon which the case and defendant's liability turned, was whether or not the decision of this court in the case of Wolcott was a final adjudication of the question of title therein passed upon; in other words, UPON THE EFFECT TO BE GIVEN TO A DECISION OF THIS COURT."

The position of counsel is clearly founded upon a total misapprehension or misstatement of the views of the Supreme Court of Iowa, and is sought to be fortified by a garbled quo-

tation from that court's opinion. The following is the extract or quotation referred to, Arg. 4 :

"We do not think a cause of action accrued upon each payment at the time it was made, nor upon all at the time the last one was made. The implied promise upon which this action is based arose by reason of the circumstances. See Goodnow vs. Mou'ton above cited. One very important circumstance was that the title was involved in serious litigation which was not terminated in the defendant's favor UNTIL 1873. We do not think the defendant's implied promise could be regarded as absolute. He, certainly, never promised to pay those taxes in case the title should be adjudicated to be in the Iowa Homestead Company, and no one had any reason to suppose he intended to incur any such liability. The most that can be said, then, in regard to the defendant's implied promise is that it was based upon a contingency; and, being so, it was not enforcible until the contingency had happened. We think that the cause of action did not arise until the termination of the litigation by which the title was adjudged to be in the defendant."

Immediately following the above extract in the court's opinion is the following, which counsel neglected to quote in his argument:

"If the Homestead Company had, before the final decision, abandoned the litigation and conceded the title to be in the defendant, it may be that a cause of action would then have accrued. WE DO NOT SAY THAT A FINAL DECISION WAS NECESSARY. We merely say that we do not think that the defendant could be understood as promising that he would pay the taxes sooner than the title was assured to him either by ADJUDICATION or CONCESSION."

The meaning of the court is clear and unmistakable. The cause of action accrued to the Homestead Company at the time that the contest about title between it and the adverse claimants ceased or terminated; and it makes no difference, under the rule, whether the contest was brought to an end by the closing of litigation or the voluntary abandonment of all

claim to the title. The court very correctly fixes the final decision in the Homestead suit as the termination of the litigation which, it was supposed, adjudged the title to be in the defendants. There never was any other suit in which it was possible for the court to adjudge the title to the lands involved in that suit to be in the defendants. No such adjudication was made or could by any possibility have been made in the Wolcott case, for the reason that the lands involved in that suit were entirely different. It is true that in the Wolcott suit the court announced the rule of law by which the title to the lands in the Homestead suit was afterwards attempted to be adjudged to be in the defendant. But that was by no means an *adjudication* of the rights of the Homestead Company, nor was it a termination of the litigation about the title to the lands claimed by that company.

3. In the next place, the rule is well settled that when a cause of action accrues under the statutes of a state, or when the statute of limitation begins to run, is necessarily a question for the determination of the state and not the federal courts.

Lytle vs. Arkansas, 22 How. 203.
Marquez vs. Brown, 16 Wall 351.
New York Ins. Co. vs. Herndron, 92 U. S. 281.

All of which is respectfully submitted.

GEORGE CRANE,
Attorney for Defendant in Error.

123-5-21

123-5-24

ARGUMENT IN RESISTANCE OF MOTION TO QUASH WRIT OF ERROR.

IN THE

SUPREME COURT OF THE UNITED STATES.

JOHN STRYKER, PLAINTIFF IN ERROR,

vs.

EDWARD K. GOODNOW, DEFENDANT IN ERROR.

ON ERROR FROM THE SUPREME COURT OF IOWA.

C. H. GATCH, FOR PLAINTIFF IN ERROR.
GEO. CRANE, FOR DEFENDANT IN ERROR.

P. C. Kenyon, Publisher Law Briefs, Des Moines

IN THE

Supreme Court of the United States.

JOHN STRYKER, *Plaintiff in Error*,
vs.
EDWARD K. GOODNOW,
Defendant in Error.

On Error from Supreme Court of Iowa.

C. H. GATCH, *for Plaintiff in Error.*

GEO. CRANE, *for Defendant in Error.*

ARGUMENT IN RESISTANCE OF MOTION TO QUASH WRIT OF ERROR.

STATEMENT.

At the October term, 1868, of the district court of Webster county, Iowa, the Iowa Homestead Company, assignor of defendant in error, an Iowa corporation, commenced a suit against the Des Moines Navigation and Railroad Company, another Iowa corporation, and numerous grantees of the latter, including plaintiff in error, to establish title in said homestead company to the so-called "Des Moines river lands," and with a view to alternative relief, in the event of an adverse decree on the question of title, made the following allegation in its petition:

> The said plaintiffs have been in possession of the lands claimed by them, themselves or their grantors in contract, *since 1861*. They have paid the taxes thereon to the state of Iowa *since*, in all amounting to eighty thousand dollars, and if their title has failed, they are entitled to

have their taxes refunded *since 1861*, by the holder of the legal title who has not paid them. Record, p. 35.

And prayed—

That in the event of a decree that the plaintiff's present title or any part of it has failed, the said Des Moines Navigation & Railroad Company and its assigns may be decreed to repay the plaintiff all the taxes which he has paid on said land and interest thereon. Record, p. 36.

The answer to this part of the petition is as follows:

As to whether or not the said complainant and its vendees have been in possession of and paid said taxes on the lands claimed by them since 1861, to the amount of $80,000, this defendant is ignorant and uninformed save by the said complainants said bill of complaint, but expressly avers that the possession of the said lands by the said complainant and its vendees since 1861, is and has been unauthorized and wrongful.

The suit having, as stated, been commenced in the district court of Webster county was remanded to the United States circuit court and, as stated by counsel for defendant in error in his brief—

In due course of litigation this court affirmed the decree of the United States circuit court for Iowa establishing title to the lands in the Des Moines Navigation and Railroad Company, and its several grantees, and denying the right of the homestead company to recover the taxes paid.

On the question of complainant's right to the alternative relief claimed, this court say in *Homestead Company vs. Valley Railroad*, 17 Wall., p. 167:

It is true, in accordance with our decision, that the taxes on these lands were the debt of the defendants, which they should have paid, but their refusal or neglect to do this did not authorize a contestant of their title to make them its debtor by stepping in and paying the taxes for them without being requested so to do. Nor can a request be implied in the relation which the parties sustained to each other. There is nothing to take the case out of the well established rule as to voluntary payments. If the appellants, owing to their too great confidence in their title have risked too much, it is their misfortune; but they are not, on that account, entitled to have the taxes voluntarily refunded by the successful party in this suit.

As it is conceded by counsel for defendant in error in his brief, that this adjudication was plead in this case as a defense,

it will not be necessary to set out the portion of the record showing that fact.

In the case of *Goodnow vs. Moulton*, 57 Ia., 555, prosecuted by Goodnow as assignee of the Homestead company for the recovery of part of these same taxes, the defense of voluntary payment having been relied upon, and the case of *Homestead Company vs. Valley Railroad*, having been cited as authority, the Supreme Court of Iowa, very strangely overlooking the above quoted paragraph of the opinion in that case say, in their opinion, page 560:

> We have looked in vain for anything in the statement of the questions involved or the opinion of the court, which tends to show, with any degree of certainty, that the right of the plaintiff to recover the taxes paid was in the case.

And more strangely still, subsequently, in this case as reported in 14 N. W. Reporter, 345, after having discovered the oversight in the Moulton case, it is said:

> Since the decisions in *Goodnow vs. Moulton*, we cannot follow the decision in *Iowa Homestead Company vs. Des Moines Navigation & Railroad Company*.

The question of voluntary payment having been thus disposed of, it became necessary for plaintiff in error to insist upon the decision in *Homestead Company vs. Valley Railroad* as an adjudication of the cause of action.

Another defense plead and relied upon, was, that at the time of the assessment and levy of the taxes in question for the year 1861—the claim embracing also those for 1862–3—the title to the lands on which they were levied was in the United States, and that they were, therefore, not subject to taxation, and that consequently their payment by the Dubuque & Sioux City Railroad Company, Goodnow's assignor as to this demand, could not, upon any theory, entitle it or its assignor to repayment. For the part of the answer setting up this defense, see record, page 7. The certificate of the court shows that of the amount of the decree, $479 was for the taxes paid for that year.

While it is true that Goodnow, assignor of the D. & S. C. R. R. Co., was not a party of record, in the case of the *Homestead Company vs. The Valley Railroad*, it is abundantly shown by the record that it was the real, substantial plaintiff in the case, owning and controlling a majority of the homestead company stock and managing its business; that a majority of the directors of the homestead company were also directors of the railroad company, and that the suit was directed and controlled by the railroad company. The testimony upon this point, very briefly indicated, was as follows:

John B. Thompson (Rec., p. 71) says he was treasurer and secretary of the homestead company from 1864 to 1873; that within a year after, Morris K. Jesup became president of the Dubuque & Sioux City Railroad Company—which, according to Jesup's own testimony (Rec., p. 80) was in the early part of the year 1866—the railroad company became the owner of five-ninths of the stock of the homestead company, and that after such change in the ownership of stock the board of directors of the homestead company was changed; and that the railroad company "by owning a majority of the stock, controlled the homestead company;" and that "after Jesup became president of the railroad company, all stock of the homestead company held by the directors of the railroad company was transferred to the railroad company, amounting to five-ninths of the whole stock." On page 73 of the record the same witness says, referring to the former suit of *The Homestead Company vs. The Navigation Company*, and others: "The Iowa Homestead Company never paid a dollar of the expenses. It was never discussed at the Iowa Homestead Company's meetings."

Morris K. Jesup (Rec., p. 80), referring to the same suit, in answer to the question, "Who, on behalf of said railroad company, had the chief control and direction of said suit, and who employed, consulted with, and generally gave direction to the attorneys who had charge of it," said: "I am president,

and I presume if any directions were given I must have given them; I do not know."

The following is the certificate, which, together with the foregoing and the copy of the decree of the Supreme Court of Iowa, will constitute a sufficient statement of the case and will show how the questions to be made in argument have become vital in this case by reason of the previous decisions of the Supreme Court of Iowa in other similar cases:

CERTIFICATE.

And now on the application of the defendant, John Stryker, it is certified by the court here and ordered to be made part of the record herein, that $479.00 of the amount herein found and adjudged to be due from defendant to plaintiff was so found and adjudged as and for that amount paid by plaintiff's assignor, as and for taxes for the year 1861 on the lands in the petition described; that said lands are part of the so-called Des Moines river lands, granted by the United States to the state of Iowa by act of congress of August 8, 1846, entitled "an act granting certain lands to the territory of Iowa to aid in the improvement of the navigation of the Des Moines river, in said territory," the joint resolution of congress of March 2, 1861, entitled "a joint resolution to quiet title to lands in the state of Iowa," and the act of congress of July 12, 1862, entitled "an act confirming a land claim in the state of Iowa, and for other purposes," and that all of said lands are located above the Raccoon fork of said Des Moines river; that the validity of said taxes and the levy thereof for the year 1861 was drawn in question herein by the defendant, Stryker, on the ground as maintained by him that the lands were public lands of the United States, at least until March 2, 1861, and, if so, were not under the law of Iowa, taxable until the year 1862; and this court decided herein that said lands were subject to taxation by the state of Iowa for the year 1861, and that said sum of $479.00 was recoverable of defendant by plaintiff because the same were so subject to taxation for that year.

And it is further certified and ordered to be made part of the record herein, that by his answer and on the hearing in said cause, the defendant claimed immunity from the entire demand and claim of the plaintiff, on the ground that, as he claimed, the same demand and claim had been adjudicated against plaintiff's assignor, the Dubuque & Sioux City Railroad Company, by the Supreme Court of the United States, in the case of *The Iowa Homestead Company vs. The Des Moines Navigation & Railroad Company*, this defendant and others, at the October term thereof, A. D. 1872, which case was, as defendant claimed and maintained in this court, prose-

cuted by said Dubuque & Sioux City Railroad Company, for its own use and benefit, in the name of said Iowa Homestead Company, and that plaintiff 's said assignor was therefore in such sense a party to said suit as to be bound and concluded herein by said adjudication therein. And that our decision herein was and is against the immunity so claimed by defendant.

DECREE.

This case coming on for final hearing and the court having duly considered the issues, the evidence and arguments of counsel, finds the issues in favor of the plaintiff, and further finds that said plaintiff is entitled to recover the sums of money paid by the plaintiff 's assignor and interest thereon from the time said several payments were made. The court also finds and decides that the plaintiff is entitled to a lien on the real estate on which said taxes were paid.

It is therefore ordered, adjudged and decreed that said Edward K. Goodnow, plaintiff, have and recover of and from the defendant, John Stryker, the sum of $828.00 and costs of suit taxed at $—— and that said claim or decree is hereby made a special lien on the following described lands: nw qr 19, 88, 27, nw qr 5, 88, 28, s hf ne qr 29, 89, 28, e hf sw qr and nw qr nw qr and se qr 7, 90, 28, and lots 1 and 2 in 13, 90, 29, Webster county, Iowa, from the 28th of April, 1873, that plaintiff have special execution and that said real estate be sold according to law.

ARGUMENT.

The record presents two federal questions, either decided or the decision of which was necessary to the decree rendered by the Supreme Court of Iowa:

First.—Whether or not plaintiff in error was entitled to immunity from the demand made on account of the taxes of 1861, on the ground that title to the land did not pass from the United States to the state of Iowa until March 2, 1861, and that, therefore, the land was not subject to taxation for that year.

Second.—Whether or not the plaintiff in error was entitled to immunity from the demand of the defendant in error, *under the decision and judgment of this court* in the case of *Homestead Company vs. Valley Railroad*, 17 Wall., 153, the controversy therein having been, as plaintiff in error claims, and, as is

alleged in his answer, between the same parties, and upon the same issue, and for the same demand, and the decision and judgment therein having been against the validity of such demand.

I.

Was the question whether or not the land upon which the taxes in question were levied were subject to taxation for the year 1861, a federal question?

It is certified that $479.00 of the amount of the judgment was on account of the taxes for 1861; that the lands are part of the lands known as "Des Moines River Lands," the title to which, according to repeated adjudications of this court, passed from the United States to the state of Iowa under the joint resolution of congress of March 2, 1861, entitled "a joint resolution to quiet title to lands in the state of Iowa;" that the validity of the tax levy for 1861 was drawn in question by plaintiff in error on the ground that the lands were, as public lands of the United States, exempt from taxation for that year; and that the decision of the court was that they were not so exempt, but were subject to taxation for the year 1861, and that said sum of $479.00 was recoverable because they were subject to taxation for that year.

By the seventh section of the act of congress, March 3, 1845, for the admission of the states of Iowa and Florida into the union, it was provided, among other things, that they shall "never interfere with the primary disposal of the public lands lying within them, *nor levy any tax on the same whilst remaining the property of the United States;*" and by the fifth section of the supplemental act of same date, it was again provided that "*no tax shall be imposed upon lands the property of the United States.*"

Section 111, paragraph 7, of the Revision of 1860, in force when the tax in question was levied, provided that—

> Government lands entered or located, or lands purchased from this state, shall not be taxed for the year in which the entry, location or purchase is made.

The Supreme Court of Iowa in *McGregor & M. R. R. Co. vs. Brown*, 39 Iowa, 655, say, on page 656:

> Government lands are not taxable until the next year after they are patented (Revision of 1860, section 4111).

And in *Iowa Falls vs. Cherokee County*, 37 Iowa, 483, on page 493, it is said:

> Since plaintiff became the owner of the land, as evidenced by the patents, on the 5th day of July, 1871, they were not taxable until 1872.

To the same effect are *Goodrich vs. Beaman*, 37 Iowa, 563, and *Iowa Falls Co. vs. Woodbury Co.*, 38 Iowa, 498.

There was, therefore, and could have been no *question* under the revenue laws of Iowa, whether or not the lands were taxable for the year in which the state should acquire title from the United States. The provision on that subject was too clear to require construction or to be open to question. And so, as just shown, the Supreme Court of the state has been accustomed to assume.

On the other hand, whenever the question of the validity of the tax levy on any of these lands for the year 1861, has been before that court, the *question* has been, whether or not the grantees of the state first acquired a taxable interest in the lands by the joint resolution referred to, or previously, by force of the original grant of August 8, 1846, and the erroneous certification of them to the state thereunder. This will be seen by reference to the cases of *Stryker vs. Polk County*, 22 Iowa, 131, and *Litchfield vs. The County of Hamilton*, 40 *Id.*, 66. In the former the question and reasoning of the court is thus stated in one of the head notes:

> Prior to the joint resolution of March 2, 1861, the *technical*, but not the *absolute*, title to these lands, within the meaning of our statute exempting from taxation the property of the federal government, was in the United States. That resolution recognized the equitable title of the *bona fide* purchaser from the state, to the extent of rendering these lands liable to taxation *from the date of their conveyance to such purchasers.*

In the other case it is said, on page 67:

> On the 2d day of March, 1861, for the purpose of *securing* and *perfecting* to *bona fide* purchasers under the state the title of the lands above the Raccoon fork, which had been previously certified to the state under the act of August 8, 1846, congress adopted a joint resolution releasing to the state of Iowa these lands. An act of congress of July 12, 1862, for the purpose of *confirming* the title to the lands supposed to have been granted by the act of August 8, 1846, to the state, extended the grant to the northern line of the state. * * *
>
> Plaintiff insists that these lands were not taxable until after the confirmatory acts above referred to. The position is assumed on the ground that the title, up to that time, was in the United States, and the state could not, therefore, levy taxes upon the lands until the plaintiff or his grantor had acquired title.
>
> This precise question was determined in *Stryker vs. Polk County*, 22 Iowa, 131. * * * it was held that the lands were taxable for 1859 and subsequent years. The decision is based upon the doctrine that the *confirmatory* congressional legislation related back to the *first grant* by the state and *perfected* the title from that time.

The precise question was determined by the court in *Litchfield vs. Webster County*, 101 U. S., 773, and *Litchfield vs. County of Hamilton*, briefly reported in a note following the opinion in the Webster county case, on page 781.

In the first mentioned case, referring to the joint resolution of 1861, it is said, on pages 774–5:

> The grant made by that resolution was just as much an original grant as if the act of 1846 had never been passed. The order of the executive department reserving them from sale, neither transferred any title to, nor created any interest in, the state. It simply retained the ownership in the United States, while the subsequent gift was undoubtedly induced by what had happened before; the United States, until it was made, continued to be the proprietor of the lands both in law and in equity. Such being the case, they were not taxable before March 2, 1861. * * * Under the revenue laws of Iowa in force at that time, government lands entered or located, or lands purchased from the state, could not be taxed for the year in which the entry, location or purchase was made.

Citing, in support of the propositon stated in the last paragraph, *McGregor & M. R. R. Co. vs. Brown*, *supra*, and other Iowa cases above cited, it is added:

The revenue year of the state for 1861 commenced before March. It is clear, therefore, that the lands were not taxable that year. They were neither entered, located, purchased from the state, nor patented within the meaning of the revenue laws until then.

Counsel for defendant in error in his brief, page 4, construes the paragraph of the opinion containing the above quoted words, "under the revenue laws of Iowa," etc., as "a plain and positive declaration on the part of the court that the liability of these lands for the taxes of 1861 depends entirely upon the construction to be given to the revenue laws of the state of Iowa."

Was it a *question* with the court whether or not, *assuming* that the lands "were neither entered, located, purchased from the state nor patented within the meaning of the revenue laws until then" they were taxable for that year? Or, on the contrary, was not the question and only question considered by the court, whether or not, *assuming* that "under the revenue laws of Iowa in force at that time government lands entered or located, or lands purchased from the state, could not be taxed for the year in which the entry, location or purchase was made," these lands *were* entered, located or purchased *in the year 1861*.

If there were any room for doubt in the language of the opinion, as there clearly is not, the decree of the court is decisive of the matter, affirming, as it does, the decree of the circuit court which held that the lands were not subject to taxation for any of the years 1859, 1860 or 1861. That the question as to the validity of the taxation for the year in question was considered and disposed of as a federal question, is, if possible, made clearer still by the different decrees rendered by this court in the two cases. The Webster county case was on appeal from the circuit court, and therefore for decision on *all questions*, while the Hamilton county case came from the state Supreme Court on writ of error, and consequently for decision *on federal questions only*. In each case Litchfield asked to be re-

lieved from the payment, not only of the taxes for the years 1859, 1860 and 1861, but also of the statutory interest and penalties on account of the taxes both for these and subsequent years.

In the Webster county case full relief was granted, with the exception of the allowance of six per cent. interest on taxes for the years subsequent to 1861, while in the Hamilton county case, as appears from the brief report contained in the note before referred to, relief from payment of penalties was refused, *for the reason* that "the liability of Litchfield for interest and penalties *after 1861* did not present any federal question," while "the decree of the state court was reversed and the cause remanded with directions to enjoin the collection of all taxes and charges on the lands in question for the years 1859, 1860 *and 1861*."

II.

Assuming that had Goodnow's assignor, the Dubuque & Sioux City Railroad Company, been a *party of record* in the case of *Homestead Company vs. Valley Railroad*, the defense of former adjudication would present a federal question, it is claimed that while it was not named as a party, it was, as to the taxes in question, the real party in interest and for all purposes the efficient *actor* in that case.

It will be seen by reference to the extracts from the pleadings contained in the statement that the taxes for the years 1861–62–63, were claimed in the same terms, as were those of the subsequent years, as part of the whole amount of $80,000, claimed to have been paid. In *Goodnow vs. Litchfield*, 59 Iowa, 226, the defense of former adjudication as to the taxes of the subsequent years was sustained.

If the railroad company was in such sense a party as to be bound by the judgment, it can make no difference that the question whether or not it was such party is not a federal

question. Plaintiff in error cannot be deprived of his immunity as a party because the fact that the railroad company was also a party, was shown by other than the usual record evidence, and a question of law was raised as to whether or not the evidence relied on was sufficient.

In *Chicago vs. Robbins*, 4 Wallace, 657, this court, on page 674, stating the rule generally as to when persons other than parties of record are bound by the adjudication, say:

> Persons notified of the pendency of a suit in which they are directly interested, must exercise reasonable diligence in protecting their interests, and if, instead of doing so, they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently be allowed to turn around and evade the consequences which their own conduct and negligence have superinduced.

In *Conger vs. Chilcote*, 42 Iowa, 18, it was held that—

> One who is benefitted by the prosecution of an action of which he has notice, is to be regarded as a party in interest, although his name does not appear therein, and he is bound by the judgment rendered.

And that—

> No particular form of notice is required, and it may be given, either orally or in writing.

The first of these propositions having been in substance held by the court below in an instruction to the jury, the Supreme Court, on pages 23–4, say:

> The instruction clearly announces the rule, that in order to hold defendant so bound, he must be found to have been a party in interest. In such case he would be bound, though his name were not used as a party to the action. We understand the instruction, so far, to mean this: If the action was prosecuted *in whole or in part for defendant's benefit*, if he were to share in the fruits of the judgment, he is to be regarded as a party in interest, and in that case is bound by the judgment rendered therein. We think there can be no doubt of the correctness of the rule. If he had such an interest in the matter involved in the action, and entrusted it to the Mt. Pleasant bank for settlement by suit, he will be estopped to deny the matters adjudicated therein.

In *Stoddard vs. Thompson*, 31 Iowa, 80, the material facts, briefly stated, were as follows: Thompson having wrongfully obtained possession of a note belonging to Stoddard, made by one Wilson, and commenced suit against Wilson for its collection, Stoddard employed counsel to defend the action, agreed with Wilson to pay the cost of defending, and was a witness in the case. The defense set up was that Stoddard, and not Thompson, was the owner of the note. Judgment on this issue was rendered in favor of Thompson. Stoddard subsequently commenced the suit, the decision in which is here cited, against Thompson and others, to enjoin the collection by Thompson of the Wilson judgment and certain other notes obtained by him of Stoddard at the same time and under the same circumstances that the Wilson note was obtained. He was held entitled to relief asked as to the notes, but not as to the judgment. The court, in the opinion, page 82, referring to the issue as to the ownership of the Wilson note made in the former suit, say:

> The issue thus made was determined in favor of Thompson, and plaintiff, Stoddard, *though not a party to the suit*, is bound by the adjudication. One who, *though not a party*, defends or prosecutes an action *by employing counsel, paying costs, and by doing those things which are usually done by a party*, is bound by the judgment rendered therein.

If, as seems to be well settled, parol evidence is admissible to show what was the matter or issue tried in a former suit, the judgment in which is offered in evidence in a subsequent suit, when that fact does not appear from the record—see *King vs. Chase*, 15 N. H., 9, and *Miles vs. Caldwell*, 2 Wall., 35—it ought to be admissible to show also by parol who of the parties in interest were *actual contestants* in a former suit, the judgment in which is offered in evidence in a subsequent suit, where the names of any of them are not shown by the record.

C. H. GATCH,
Attorney for Plaintiff in Error.

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Argument in Resistance of Motion to Quash Writ of Error.

IN THE

Supreme Court of the United States.

JOHN STRYKER, Plaintiff in Error,

vs.

EDWARD K. GOODNOW, Defendant in Error.

ON ERROR FROM THE SUPREME COURT OF IOWA.

C. H. GATCH, for Plaintiff in Error.
GEO. CRANE, for Defendant in Error.

P. C. Kenyon, Publisher Law Briefs, Des Moines.

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Supreme Court of the United States.

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vs.
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On Error from Supreme Court of Iowa.

C. H. GATCH, *for Plaintiff in Error.*

GEO. CRANE, *for Defendant in Error.*

ARGUMENT IN RESISTANCE OF MOTION TO QUASH WRIT OF ERROR.

STATEMENT.

At the October term, 1868, of the district court of Webster county, Iowa, the Iowa Homestead Company, assignor of defendant in error, an Iowa corporation, commenced a suit against the Des Moines Navigation and Railroad Company, another Iowa corporation, and numerous grantees of the latter, including plaintiff in error, to establish title in said homestead company to the so-called "Des Moines river lands," and with a view to alternative relief, in the event of an adverse decree on the question of title, made the following allegation in its petition:

> The said plaintiffs have been in possession of the lands claimed by them, themselves or their grantors in contract, *since 1861*. They have paid the taxes thereon to the state of Iowa *since*, in all amounting to eighty thousand dollars, and if their title has failed, they are entitled to

have their taxes refunded *since 1861*, by the holder of the legal title who has not paid them. Record, p. 35.

And prayed—

That in the event of a decree that the plaintiff's present title or any part of it has failed, the said Des Moines Navigation & Railroad Company and its assigns may be decreed to repay the plaintiff all the taxes which he has paid on said land and interest thereon. Record, p. 36.

The answer to this part of the petition is as follows:

As to whether or not the said complainant and its vendees have been in possession of and paid said taxes on the lands claimed by them since 1861, to the amount of $80,000, this defendant is ignorant and uninformed save by the said complainants said bill of complaint, but expressly avers that the possession of the said lands by the said complainant and its vendees since 1861, is and has been unauthorized and wrongful.

The history of this suit is thus correctly given in the statement of counsel for defendant in error in his brief:

The suit was commenced in the district court of Webster county, Iowa, and was then transferred to the circuit court of the United States for Iowa. At the final hearing in the circuit court the petition was dismissed. On appeal to this court the decision below was affirmed, and the right to recover the taxes paid was denied.

On the question of complainant's right to the alternative relief claimed, this court say in *Homestead Company vs. Valley Railroad*, 17 Wall., p. 167:

It is true, in accordance with our decision, that the taxes on these lands were the debt of the defendants, which they should have paid, but their refusal or neglect to do this did not authorize a contestant of their title to make them its debtor by stepping in and paying the taxes for them without being requested so to do. Nor can a request be implied in the relation which the parties sustained to each other. There is nothing to take the case out of the well established rule as to voluntary payments. If the appellants, owing to their too great confidence in their title have risked too much, it is their misfortune; but they are not, on that account, entitled to have the taxes voluntarily refunded by the successful party in this suit.

As it is conceded by counsel for defendant in error in his brief, that this adjudication was plead in this case as a defense,

it will not be necessary to set out the portion of the record showing that fact.

In the case of *Goodnow vs. Moulton*, 57 Ia., 555, prosecuted by Goodnow as assignee of the Homestead company for the recovery of part of these same taxes, the defense of voluntary payment having been relied upon, and the case of *Homestead Company vs. Valley Railroad*, having been cited as authority, the Supreme Court of Iowa, very strangely overlooking the above quoted paragraph of the opinion in that case say, in their opinion, page 560:

> We have looked in vain for anything in the statement of the questions involved or the opinion of the court, which tends to show, with any degree of certainty, that the right of the plaintiff to recover the taxes paid was in the case.

And more strangely still, in the subsequent case of *Goodnow vs. Stryker*, 14 N. W. Reporter, 345, being another case against plaintiff in error and now also pending here on a motion similar to this, after having discovered the oversight in the Moulton case, it is said:

> Since the decisions in *Goodnow vs. Moulton*, we cannot follow the decision in *Iowa Homestead Company vs. Des Moines Navigation & Railroad Company.*

The question of voluntary payment having been thus disposed of, it became necessary in that case to dispose of the further defense relied on, that the claim was barred by the New York statute of limitations, and this involved the real and decisive question, *when* and *how* did the cause of action accrue, which the opinion thus discusses and determines.

> We do not think a cause of action accrued upon each payment at the time it was made, nor upon all at the time the last one was made. The implied promise upon which the action is based, arose by reason of the circumstances. See *Goodnow vs. Moulton*, above cited. One very important circumstance was that the title was involved in serious litigation which was not terminated in the defendant's favor until 1873. We do not think the defendant's implied promise could be regarded as absolute. He certainly never promised to pay these taxes in case the title should

be adjudicated to be in the Iowa Homestead Company, and no one had any reason to suppose he intended to incur any such liability. The most that can be said then in regard to the defendant's implied promise is, that it was based upon a contingency, and being so, it was not enforcible until the contingency had happened. We think that the cause of action did not arise until the termination of the litigation by which the title was adjudged to be in the defendant.

Plaintiff in error accepting this as settling the proposition that a cause of action accrued to the homestead company by "the termination of the litigation by which the title was adjudicated to be in the defendant," the Des Moines Navigation & Railroad Company, plead as one of its defenses in this case, the New York statute of limitations, of which state plaintiff in error was a citizen, relying on the decision of this court in the cases of *Wolcott vs. The Des Moines Company*, and *The Des Moines Company vs. Burr*, 5 Wall., 681 and 689, as being such termination of that litigation. For answer, setting up this defense—see record, pages 6 and 9—and for the evidence showing the intervention of the homestead company in the two last named cases—see record, pp. 66–81.

Defendant in error in his original petition based his claim upon an assumed implied promise resulting from the payment of the taxes by his assignor, the Iowa Homestead Company, as they from year to year became due, under claim and belief of ownership by it of the lands on which they were paid.

Webster county by some means becoming or assuming to be a party to the suit, filed a pleading in which it alleged that Stryker had never paid the taxes, and that they were due from him to the county. Stryker, by his answer to Goodnow's petition, made general denial, and plead the Iowa statute of limitations and the *voluntary* payment of the taxes by Goodnow's assignor. His answer to the pleading of the county, contained the following as paragraph three:

PAR. 3. Said defendant, further answering, says that all of said taxes mentioned in said petition were duly paid by said Iowa Homestead Company as soon as the same became due, and said defendant is no longer liable therefor.

The cause having on the first appeal to the Supreme Court been reversed and remanded to the lower court for another trial, Stryker was permitted to amend his former answer, which he did by pleading the former adjudication and repeating his former plea of the statute of limitations of New York. There was no allegation of any *new* promise, express or implied, in any pleading filed either by Goodnow or Webster county, and the only reply by Goodnow to the plea of former adjudication was, that the judgment was void because "the courts of the United States had no jurisdiction of the suit" in which the adjudication was had; in addition to which he had the benefit of a denial by force of the Iowa statute. Upon this state of the record the Supreme Court of Iowa says in its opinion that neither the former adjudication nor the bar of the statute of limitations could avail as a defense because of an assumed new promise contained in the above quoted paragraph of the answer to the pleading of Webster county, and made, therefore, if it can in any sense be said to have been made, *after the suit was commenced.*

The following is the certificate which, together with the foregoing and the copy of the decree of the Supreme Court of Iowa, will constitute a sufficient statement of the case and will show how the questions to be made in argument have become vital in this case by reason of the previous decisions of the Supreme Court of Iowa in other similar cases.

CERTIFICATE.

And now on the application of the defendant John Stryker [redacted] Navigation Company, it is certified by the court here, and ordered to be made part of the record herein, that by the answer of defendant, in defendant's assignment of errors in the additional abstract, and on the hearing in said cause, the defendant claimed immunity from the entire demand and claim of plaintiff, on the ground that, as he claimed, the same demand and claim had been adjudicated against plaintiff's assignor, the Iowa Homestead Company, by the Supreme Court of the United States, in the case of *The Iowa Homestead Company vs. The Des Moines Navigation and Railroad Company*, this defendant and others, at the October term thereof

A. D. 1872, and that our decision herein was and is against the immunity so claimed by defendant.

And it is further certified and ordered to be made part of the record herein, that by defendant's answer and on the hearing in said cause, defendant claimed immunity from said entire claim and demand, because, as was claimed, the alleged cause of action not having accrued within six years immediately preceding the commencement of the action, was barred by the New York statute of limitations, and that to determine whether or not it was so barred, it became material and necessary to decide whether or not the decision of the Supreme Court of the United States, in the case of *Samuel G. Wolcott vs. The Des Moines Navigation and Railroad Company*, was a final determination of the question therein decided, in order to determine when the plaintiff's cause of action accrued, and that our decision herein was and is that said decision was not a final determination of said question and was and is against the immunity so claimed because of our said decision that said determination was not final.

DECREE.

This cause coming up for final hearing this 5th day of June, 1884, the plaintiff appearing by his attorney, George Crane, and the defendant, John Stryker, by C. H. Gatch, his attorney, and the cause being duly submitted on the pleading, evidence and argument of counsel, and the court having duly considered the same, find the issues in favor of the plaintiff, Edward K. Goodnow. It is therefore ordered, adjudged and decreed that plaintiff have and recover from and of the defendant the sum of ten hundred and ninety-two and 61-100 dollars ($1092.61) and costs of suit, taxed at one hundred eighty-eight and 15-100 dollars ($188.15), and this decree be and is hereby made a special lien on the following real estate: The south half of the northeast quarter of section 29, township 89, range 28; the northeast quarter of section 5, township 88, range 28; the northwest quarter of section 19, township 88, range 27; the east half and southwest quarter and northwest quarter of southwest quarter, and the southeast quarter of section 7, township 90, range 28, all in Webster county, Iowa, from the date of the decree below, to-wit: October 2, 1883, and that he have a special execution, and that said real estate be sold thereunder, according to law, and if the sale does not realize enough to satisfy this decree and costs, then plaintiff shall have a general execution for the balance.

ARGUMENT.

The record presents two federal questions, either decided or the decision of which was necessary to the decree rendered by the Supreme Court of Iowa:

First.—Whether or not the plaintiff in error was entitled to immunity from the demand of the defendant in error, *under the decision and judgment of this court* in the case of *Homestead Company vs. Valley Railroad*, 17 Wall., 153, the controversy therein having been, as plaintiff in error claims, and, as is alleged in his answer, between the same parties, and upon the same issue, and for the same demand, and the decision and judgment therein having been against the validity of such demand.

Second.—The plaintiff in error claimed immunity from the demand of the defendant in error, because *by force and virtue of the decision of this court* in the case of *Wolcott vs. Des Moines Co.*, 5 Wall., 681, and the *Des Moines Co. vs. Burr*, *Id.*, 689, the cause of action accrued, if ever, at the date of said decision, and was, therefore, at the commencement of this suit, barred by the statute of limitations of the state of New York.

The decision of this question, and the necessity therefor, by the Supreme Court of Iowa, are thus stated in the certificate found on page 116 of the original record:

> To determine whether or not it was so bound, it became necessary to decide whether or not the decision of the Supreme Court of the United States in the case of *Samuel G. Wolcott against the Des Moines Navigation and Railroad Company was a final determination of the question therein decided.* * * * And our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed *because of our said decision that said determination was not final.*

I.

It is not denied that the plea of former adjudication was a claim of immunity under an authority exercised under the United States, and raised a federal question, but it is insisted that the decision was not a decision against the immunity so claimed, and that such a decision was not necessary to the decree rendered for the reason that, as is maintained, there was another issue in the case upon which the decision might be

and was made and upon which the decree can be maintained regardless of the federal question.

Whether or not this position is maintainable involves two questions: *First*—Whether or not the case was in fact so decided; and, *second*—whether or not there was any such other question upon which it might have been so decided.

First.—Was it so decided? It is clear, both from the opinion and the certificate, that it was not.

The opinion very clearly indicates that the decision involved the question, whether or not the act of claiming the benefit, as consideration for an implied promise, *after* the adjudication, of the payments made *before* the adjudication, and which were thereby adjudged to have been *voluntary* payments, and for that reason not recoverable, could on some principle of relation and ratification be made to obviate the effect of the adjudication. In other words, whether or not the ingeniously contrived new implied promise could be supported by a consideration that had already been adjudged insufficient to create a liability.

The following is the language of the opinion referred to:

> The case before us is peculiar. The act done was such that it necessarily inured to the defendant's sole benefit. Besides, the circumstances under which the act was done, should not be overlooked. The defendant neglected the payment of the taxes, which was a duty of public concern. He allowed the plaintiff 's assignor, under an honest claim of title to the land, to discharge this duty for several years in succession. Now, while the plaintiff is not allowed, by reason of prior adjudication, to set up these facts *as alone sufficient to create a liability on the part of defendant*, they may be considered, we think, *in connection with the fact that the defendant has since claimed the benefits of the payments* as sufficient to render such claim of benefit, a ratification, if it otherwise would not be.

What the Supreme Court of Iowa must necessarily have considered and passed upon was whether or not the assumed moral obligation was sufficient consideration to raise and support an implied promise to pay an assumed debt, not only barred by the statute of limitations, but that had been already adjudged by this court *not to be a debt;* and in doing so it

necessarily decided against the immunity claimed under the prior adjudication, by holding the new promise to have robbed that adjudication of its "force and effect."

That such was the view of the state court is further made evident by its certificate which, as to this question, concludes with the words, "our decision herein was and is against the immunity so claimed by defendant."

Second.—Was there any other question upon which the case might have been decided, as it was decided, without regard to the federal question? The only question or ground upon which it is claimed that it might have been, and in fact was so decided, is that of the alleged new promise.

As already shown this, had it really been an issue in the case, was so related to the question of former adjudication as necessarily to involve the latter question in the decision. *But that issue was not in the case.* The so-called new promise was made *after the commencement of the action*, and was not plead by Goodnow, either by way of amendment of his petition or in his reply, *or in any pleading in the case.* The court having made the discovery kindly sought to give him the benefit of it, accompanied with an apparent reflection upon defendant's counsel in the suggestion, "whether the action was *premature* is a different question, *and one not raised.*" *How could it have been raised upon the pleadings or any issue in the case?*

The court, quite unwarrantably in the first paragraph of the opinion, assumes that a *new* implied promise was plead by Goodnow in reply to the plea of former adjudication, using this language:

> The defendant pleaded as one of its additional defenses that the plaintiff's right of recovery is barred by a prior adjudication to-wit: An adjudication in the case of the *Iowa Homestead Company vs. Des Moines Navigation and Railroad Company*, reported in 17 Wall., 153. To this plea the plaintiff replies in substance that if it should be conceded that the court made an adjudication in that case denying a right of recovery for the taxes in question in this case, yet this action is not barred because a right of recovery has arisen since that time. The fact relied upon as

giving such right of recovery is that the defendant now claims, as he did not then, the benefit of the payments made by the homestead company.

The fact is, as will be seen by reference to the record, pages 1 to 9, that plaintiff did nothing of the kind. *There is not a line or syllable anywhere in the record, showing that any such reply or the semblance of it was filed.*

II.

The question upon which, in the Stryker case, referred to in the statement, the defense of the statute of limitations turned, was, whether the cause of action accrued at the dates of the respective payments of the taxes, or when the question of title was finally determined by the decision of this court as between the claimants respectively, under the so-called river land and railroad grants, and, if at the date of the final decision of that question, whether or not the decision in the cases of Wolcott and Burr, 5 Wall. *supra*, was such final determination. How the question assumed that form is shown by the extract from the opinion in the case, copied into the foregoing statement.

The court having thus in effect made the question of defendant's liability to depend upon the time of "the termination of the litigation by which the title was adjudicated to be in defendant," the ultimate and precise question as shown by the certificate, as above quoted, upon which the case and defendant's liability turned was, whether or not the decision of this court in the cases of Wolcott and Burr was a final adjudication of the question of title therein passed upon; in other words, upon the effect to be given to a decision of this court. While, in terms and immediately, immunity was claimed under the statute of limitations, yet the ultimate and essential ground upon which the claim must be allowed, if at all, was that, according to the true interpretation and effect of the decision in the cases just named, a cause of action thereby and of that date accrued to the defendant in error.

Plaintiff in error maintained that the decision in these cases was final, while the court held that the question was not finally decided until 1873, meaning in the cases of *Williams vs. Baker*, 17 Wall., 144, and *Homestead Company vs. Valley Railroad*, *Id.*, 153, and, so holding, necessarily held that the action was not barred. From the contrary holding it would have as necessarily followed that the action was barred. There was no question requiring a construction in any respect of the New York statute of limitations, nor was its application to the case dependent upon any controverted fact proposition. The real and only question, therefore, was, whether or not the decision of this court in the Wolcott and Burr cases was *final* in such sense as that, according to the rule or doctrine laid down by the Supreme Court of Iowa, a cause of action then accrued. That decision was made in cases to which, by intervention, the assignor defendant in error was a party, as will be seen by reference to the record, pages 88–100. That the homestead company must be treated as having been a party to the Wolcott and Burr cases for the purposes of this question, is further evident from the following taken from the opinion of this court in *Williams vs. Baker*, 17 Wall., 144, referring to a complaint of collusion between the parties in the Wolcott and Burr cases, and the claim that for that reason it should not be treated as an authoritative adjudication. On pages 150–2, the court says:

> We must be permitted to question both the taste and legal competency of testimony offered in an inferior court to show that a decision in this court was obtained by fraudulent devices, *when that decision is not relied on as evidence of any fact or pleaded as an estopple, but merely because it may be referred to as settling a principle of law applicable to the case at bar.*
>
> There is in the record of that case as it remains in this court sufficient answer to this objection to the opinion *as an authority on the law in this case*. The writer of this opinion, though then a member of the court, declined to take any part in its decision because he had been of counsel for the navigation company in a general way, and did not know how far he might have been engaged in that case. But when it was submitted on printed arguments on both sides he saw at once that the legal propositions

involved did affect materially the title of several railroad companies in Iowa to the lands in question, and he felt it to be his duty to call the attention of those of his brethren who must decide the case to that fact. On this suggestion an order was made that those companies be notified of the pendency of that suit, with liberty to intervene and be heard on the question in which they were interested. They did intervene, the case was postponed for over a year, and several arguments were submitted in favor of the railroad companies by able counsel *on the very question now under consideration*, and an order was made inviting all parties interested to do so. It was after a full consideration of all these arguments that the decision was made. But there was an additional security that the court would carefully consider the question, in the fact that there was submitted at the same time the case of *Burr vs. The Des Moines Navigation & Railroad Company*, on a similar warranty of title. Now, though both suits were decided in the circuit court for the southern district of New York, they were decided by different judges, and the decisions were in conflict. This of itself would demand of the court a careful consideration of the point of difference which was the very point now under consideration. * * *

Whatever, therefore, may have been the design of the original parties to the suit of *Wolcott vs. The Des Moines Company*, it is clear that the question here involved was argued fully by parties deeply interested on both sides, and received the attentive consideration of the court, and as an authoritative exposition of its views is entitled to the same weight as other well considered cases.

The Wolcott–Burr decision has repeatedly been reaffirmed, and the court in *Homestead Company vs. Valley Railroad*, 17 Wall., on page 162, thus refers to it:

> The main question involved in this case is the question of the title to the Des Moines river lands which was settled several years ago by the decision in the cases of Wolcott and Burr and in the subsequent and unreported case of *Riley vs. Wells* adversely to the title set up by the appellants. At the present term of this court the principles involved in these decisions have been reconsidered and reaffirmed.

The question here is, whether, upon the question whether or not the decision in the Wolcott and Burr cases was such final determination of the question of title, as that a cause of action then accrued, the decision of the state court is final, or whether, being a question as to the proper interpretation and effect of a decision of this court, it is a "federal question" within the meaning of the act of congress.

It is respectfully submitted that upon this point the case is within the principle of the following decisions of this court: *Dupasseur vs. Rochereau*, 21 Wall., 130, in which on error to the Supreme Court of Louisiana this court took and exercised jurisdiction to determine whether or not, upon a question of the order of priority of liens, the decree of the state court foreclosing a mortgage, accorded due force and effect to a decree previously rendered in the United States circuit court for that state foreclosing another mortgage on the same premises; and in *Embry vs. Palmer*, 2 Supreme Court Reporter, 25, in which it was held that this court might, on error, review the judgment of the Supreme Court of Connecticut enjoining the collection of a judgment rendered by the Supreme Court of the District of Columbia.

While in terms the certificate states the question to have been whether or not the decision in the Wolcott case was a *final* decision of the question of title, it is obvious that it could only have been, whether or not, upon the theory of that court as to the nature of the implied promise and the condition upon which a suit could be brought, it was such a decision of the question as gave to the defendant in error an immediate right of action upon it.

The defendant in error having been a party in such sense and manner, certainly, as to be concluded by the adjudication, the decision was necessarily final, unless and until in some manner reviewed and set aside by this court, of which having been done there is no pretense. The Supreme Court of Iowa must therefore necessarily have held that the question of title was not one of the questions decided in the Wolcott and Burr cases, as otherwise it must necessarily have held a cause of action to have then accrued and to have been barred long before the commencement of this suit. The question therefore in reality was, whether or not the question of title was decided, and not as to its being or not being final. How long must the defendant in error have waited to find out whether or not the

decision was final and gave it a right of action? Was it to wait until the commencement of another action, and if such action had never been commenced would the decision have never become final? Truly, error is the most prolific of mothers. What a brood has come of the original one of taking a devious by-way in the case of *Goodnow vs. Moulton*, *supra*, instead of following the plain and century beaten pathway of *Homestead Company vs. Valley Railroad*, *supra*, and *Garrigan vs. Knight*, 47 Iowa, 525, with respect to the law of *voluntary* payments.

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